Supreme Court, U.S.
FILED
JAN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1170
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TERRY J. O'REAR,

PETITIONER,

V.

ATTORNEY GENERAL OF THE STATE OF WISCONSIN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Respectfully submitted by:

TERRY J. O'REAR
Wisc. Inmate No. 123826
P.O. Box 7203
Madison, WI 53707-7203
(608) 255-8486

Petitioner, pro se

January 1988

QUESTIONS PRESENTED

1. Whether the standard of proof established in Barefoot v. Estelle, 463 U.S. 880, 893, n. 4 for granting a certificate of probable cause under 28 USC 2253 is undermined and contradicted by a Circuit Court requiring the State habeas (Sect. 2254) petitioner "to demonstrate that he should prevail on the merits"?

2. Whether under 28 U.S.C. 2253 and as applied by F.R.A.P. 22(b) a District Court is required to list reasons for rejecting an application for a certificate of probable cause in State habeas (Sect. 2254) cases within the text of the document of such rejection? And, if so, whether such 'reasons' must be specific, general, or whatever? And, also if so, are Circuit Courts responsible for insuring that its District Courts act accordingly?

3. Can a State's independent intervention in the process of an applicant's filing for a petition of habeas corpus under 28 USC 2254 (whereby via a hurried unscheduled discharge the applicant is forced to have his habeas documents 'date stamped' after being so discharged from parole) be considered 'just cause' to excuse any procedural default found in the applicant's inability to obtain a 'date stamp' prior to the speeded-up discharge, especially when the applicant had clearly established before Court officials his intent to soon file prior to such intervention?

4. Whether "custody for the purposes of habeas corpus review" under 28 USC 2254 can be established by either or both of the two separate situations: a) restraints and restrictions placed upon a petitioner's

liberty, ability, and recognized right to international travel and movement; b) the "collateral consequences" that directly flow from a petitioner's prison-time conviction (which originally resulted in his imprisonment and complete loss of liberty) and that continue to restrain him despite his discharge from prison and parole?

5. Whether the interest of justice would best be served by having a District Court at least review, if not address, the 'merits' of a State Sec. 2254 habeas applicant's petition and make note of such review before summarily dismissing the petition on 'jurisdictional-custodial' grounds, particularly when the applicant complains of clear and pervasive violations of the 5th and 14th Amendments in the State process below: through governmental withholding, supression and unexplained loss of evidence; through the knowing use of false and misleading testimony; through the improper combined effect such behavior had upon a lay jury; and through State court rulings after the verdict that fly in the face of Napue v. Illinois, 360 U.S. 264 (1959), Chapman v. California, 386 U.S. 18 (1967), U.S. v. Augenblick, 393 U.S. 348 (1969), and U.S. v. Bagley, 473 U.S. ___ (1985) and by the fact that evidence, unknown at the time of trial to the defendant personally, which tends to establish his innocence was never presented to the jury?

LIST OF PARTIES

All the parties to the proceedings below are listed in the caption, with the Respondent being represented at all times by Asst. Attorney General Barry M. Levenson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	16
I. The 7th Circuit's ruling that a habeas applicant seeking a C-P-C must "demonstrate that he should prevail on the merits" is at odds with the meaning, intent & language of This Court's ruling in Barefoot and conflicts with decisions of other Circuit Courts	16
II. The District Court's Order denying a Certificate of Probable Cause failed to list the reasons for its conclusion and hence is in violation of the standing requirements of the 7th Circuit & other Circuits and of the guidelines of F.R.A.P. 22(b) as established by This Court. The Circuit Court should have acted sua sponte to enforce its own rules and guidelines	22

Page

III. The District Court's Order dismissing petitioner's habeas petition on jurisdictional grounds is at odds with rulings of other Federal Courts and with interpretations of rulings of This Court as made by other Courts and 'jurists of reason' and it failed to consider the 'totality of the circumstances' involved. Given the variety of interpretations of different jurisdictions and the continued confusion on the issue of 'custody for the purposes of habeas review' and the need for a clear national standard, the time is ripe for This Court to clarify whether 'custody for the purposes of habeas review' can be established by any or all of the three situational arguments outlined hereunder as A, B, & C 28

A. On Argument/Collateral-Jurisdictional Issue No. 1: Custody for the purposes of habeas review can be established when a situation has been created by the State's independent intervention, whereunder a petitioner is forced to have his habeas documents 'date stamped' (a/k/a 'filed') after he has been discharged from paroled custody, such State action constitutes 'just cause' to excuse any procedural default found in petitioner's inability to obtain a 'date stamp' on his habeas documents prior to his discharge from parole, and such a habeas petition can be considered to be 'effectively filed' prior to the forced discharge date, particularly when petitioner's intent to file was clearly established before officials of the Federal

Page

District Court prior to such intervention 29

B. On Argument/Collateral-Jurisdictional Issue No. 2: Restraints on Movement are a recognized special 'restraint on individual liberty'; and such restraints placed upon a petitioner's recognized right to international travel & movement establish 'custody for the purposes of habeas review,' particularly when such travel is required by petitioner's trade, occupation, or field of study 38

C. On Argument/Collateral-Jurisdictional Issue No. 3: General Collateral Consequences which directly flow from a petitioner's conviction (that originally resulted in his imprisonment & complete loss of liberty) and which continue to restrain him in a variety of ways even after his having been discharged from parole are of sufficient and severe enough restraint on his individual liberty so as to establish custody for the purposes of habeas review 45

IV. The 'Merits' of the Claims of Constitutional Error in the State process below have Never been reviewed at the Federal level. The Interest of Justice and Fairness demand that the claims of error at least be looked at and noted, if not reviewed or fully addressed, before a habeas petition is summarily dismissed by a District Court on jurisdictional grounds without even noting the claims of error..55

Page

CONCLUSION..... 62

(printed names of counsel)..... 64

APPENDIX
(reprints)

Appendix A 1a
(Order and Judgment of Court of Appeals (7th) of 05-14-87)

Appendix B 3a
(Circuit Order on Rehearing of 08-12-87)

Appendix C 5a
(W.D. of Wis. Order on Request for C-P-C dated 03-27-87)

Appendix D..... 7a
(District Order of 03-04-87 on habeas petition)

Appendix E 17a
(District 'show cause' Order of 01-12-87)

Appendix F 21a
(relevant portions of the Constitutional Provisions, Statutes & Regulations involved)

Appendix G 30a
(Statements on the Facts of the Case previously presented to the District Court, 12-31-86)

Appendix H 54a
(Extended Quotation from: Barefoot v. Estelle, 463 U.S. 893, n.4 (1983)

Page

Appendix I 55a
(Outstanding Questions concerning jurisdiction/standing presented to the District Court on 03-26-87 in doc. no. 19 below)

Appendix J 62a
(Allegations of Constitutional Error - as presented initially to the State of Wisconsin court system following conviction and as presented and discussed in the habeas petition presented to the W.D. of Wisc. Federal Court on 12-31-86 - in list form)

TABLE OF AUTHORITIES

Cases: Page

Allen v. Hardy, 106 S.Ct. 2878 (1986).. 5

Atkins v. Hooper, 234 Ga. 330, 216 S.E.2d 89 (Ga.1975) 49

Barefoot v. Estelle, 463 U.S. i, 16-21, 880 (1983)..... 23,29,47,62, 54a

Braden v. 30th Jud. Cir. Ct. of Kentucky, 410 U.S. 484 (1973)..... 46

Brady v. Maryland, 373 U.S. 83 (1963)..66a

Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir.1986)..... 20

Brown v. Allen, 344 U.S. 443 (1953)... 34

Page

Brown v. Booker, 622 F.Supp. 993 (E.D. Va.1985) 23

Brownell v. Tom We Shung, 352 U.S. 180 (1956)..... 41

Burwell v. Teets, 350 U.S. 808 (1955) 4

Carafas v. LaVallee, 391 U.S. 234 (1968) 37,48,50

Carter v. Procunier, 755 F.2d 1126 (5th Cir.1985) 35

Chapman v. California, 386 U.S. 18 (1967) ii

Commonwealth v. Doria, 468 Pa. 534, 364 A.2d 322 (Pa.1976) 49

Commonwealth v. Markley, 348 Pa.Supp. 194, 501 A.2d 1137 (Pa.Super.1985)..49

Commonwealth v. Rhode, 485 Pa. 404, 402 A.2d 1025 (Pa.1979) 49

Davis v. Jacobs, 454 U.S. 911 (1981) 4-5

Escobedo v. Estelle, 650 F.2d 70 (5th Cir.1981), rehearing denied 655 F.2d 613 (5th Cir.1981) 48

Evitts v. Lucey, 469 U.S. 387 (1985)..... 46

Ex parte Griffin, 679 S.W.2d 15 (Tx.Cr.App.1984) 49

Page

Ex parte Guzman, 551 S.W.2d 387 (Tex.Cr.App.1977) 49

Ex parte Oliver, 703 S.W.2d 205 (Tex.Cr.App.1986) 49

Ex parte Ormsby, 676 S.W.2d 130 (Tex.Cr.App.1984) 49

Fabian v. Reed, 714 F.2d 39 (5th Cir.1983) 20

Fleming v. Kemp, 794 F.2d 1478 (11th Cir.1986) 20

Flowers v. Blackburn, 764 F.ed 276 (5th Cir.1985)(per curiam), appeal decided 779 F.2d 115 (5th Cir.), cert. den'd 106 S.Ct. 1661 20

Gardner v. Pogue, 558 F.2d 548 (9th Cir.1977) 23

Giglio v. United States, 405 U.S. 150 (1972) 59, 66a

Glover v. North Carolina, 301 F.Supp. 364 (E.D. N.C.1969) 47,53

Gordon v. Willis, 516 F.Supp. 911 (N.D. Ga.1980) 54a

Granberry v. Greer, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) 55

Hamric v. Bailey, 386 F.2d 390 (4th Cir.1967) ..... 59 ,66a

Hanson v. Cir. Ct. of 1st Judical Cir. of Illinois, 591 F.2d 404 (7th Cir.1979),c. den. 444 U.S. 907.. 50-1, 53

Page

Hardinson v. Martin, 254 Ga. 719, 334 S.E.2d 161 (Ga.1985)..... 48

Harris v. Nelson, 394 U.S. 286 (1969) 36

Harts v. State of Indiana, 732 F.2d 95 (7th Cir.1979)..... 59a

Harvey v. State of South Dakota, 526 F.2d 840 (8th Cir.1976), cert. den'd 426 U.S. 911 (1976) 52-3

Herrera v. Payne, 673 F.2d 307 (10th Cir.1982), cert. den'd in Trujillo v. Winans, 469 U.S. 936 (1982)..... 22-4,26

House v. Mayo, 324 U.S. 42 (1945).. 3,4

Humphrey v. Cady, 405 U.S. 504 (1972) 5

In re Hunt, 348 U.S. 968 (1955).... 5

Johnson v. McCotter, 794 F.2d 1011 (5th Cir.1986) 20

Jones v. Cunningham, 371 U.S. 236 (1963)..... 36-7, 39-41

Lesbian/Gay Freedom Day Committee, Inc. v. U.S. I.N.S., 541 F.Supp 569 (N.D.Ca.1982), aff'd 714 F.2d 1470 (9th Cir.1983)..... 42-3

Matter of Powell, 92 Wash.2d 882, 602 P.2d 711 (Wash.1979) 49

Murray v. Carrier, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) 35

Page

Napue v. Illinois, 360 U.S. 264 (1959) ..... ii, 59, 66a

Nelson v. Lefkowitz, 428 F.Supp. 660 (S.D. N.Y.1977) 36

Nowakowski v. Maroney, 386 U.S. 542 (1967)..... 5

O'Bryan v. McKaskle, 729 F.2d 991 (5th Cir.1984) 20

Parris v. State, 232 Ga. 687, 208 S.E.2d 493 (Ga.1974) 49

Passic v. State, 98 F.Supp. 1015 (E.D. Mich., S.D.1951) 35

Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (Kings Bench, 1722)..... 40

Rex v. Delabal, 3 Burr. 1434, 97 Eng. Rep. 913 (Kings Bench, 1763)..... 40

Rogers v. Teets, 350 U.S. 809 (1955) 4

Rosoto v. Warden, 374 U.S. 201 (1963) 4

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)... 41

Sibron v. New York, 392 U.S. 40 (1968) 48

Smith v. Digmon, 434 U.S. 332 (1978) 5

Strait v. Laird, 406 U.S. 341 (1972) 48,50,53

Page

U.S. ex rel. Breedlove v. Dowd, 269 F.2d 693 (7th Cir.1959)..... 22

U.S. ex rel. Jones v. Richmond, 245 F.2d 234 (2nd Cir.), cert den'd 335 U.S. 846 (1957) 54a

U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) 41

U.S. ex rel. Meers v. Wilkins, 326 F.2d 135 (2nd Cir.1964) 67a

U.S. ex rel. Montgomery v. Ragen, 86 F.Supp. 382 (N.D. Ill., E.D. 1949) 67a

U.S. v. Agurs, 427 U.S. 97 (1976).. 66a

U.S. v. Augenblick, 393 U.S. 348 (1969) ii,60,65a

U.S. v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ii,66a

U.S. Bottone, 365 F.2d 389 (2nd Cir. 1966) 67a

U.S. v. Bryant, 142 U.S.App. D.C. 132, 439 F.2d 642 (1971).. 60,65a

U.S. v. Handy, 761 F.2d 1279 (9th Cir.1985) 19

U.S. v. Iverson, 637 F.2d 799 (D.C. Cir.1980) 59,66a

U.S. v. Jung Ah Lung, 124 U.S. 621 (1888) 41

Page

U.S. v. Loud Hawk, 628 F.2d 1139 (9th Cir.1979)(en banc)... 61,65a

U.S. v. Pollock, 417 F.Supp. 1332 (D.Mass.1976)..... 61,65a

Walker v. Engle, 703 F.2d 959 (6th Cir.1983) 67a

Woolls v. McCotter, 798 F.2d 695 (5th Cir.1986) 20

Constitutional Provisions and Federal Law, Statutes, Rules, etc.

U.S. Constitution
Art. I, Sect. 9..... 5,27,21a

5th Amendment ii,5,21a

14th Amendment ii,5,22a

28 U.S.C. Sect. 1254(1)..... 3,5,22a

28 U.S.C. Sect. 1651 ..... 3,6,63,22a

28 U.S.C. Sect. 2241(c)(3) 6,23a

28 U.S.C. Sect. 2253 ..... i,6,23a

28 U.S.C. Sect 2254 ..... passim & (23a-27a)

Rule 22(b), Federal Rules of Appellate Procedure i,6,14,23 27a-28a

Rule 1, Rules Governing Section 2254 Cases in the United States District Courts 6,28a-29a

Page

Wisconsin State Statutes

Sec. 940.225(2)(a)..... 7

Sec. 940.30 7

Sec. 972.11(2)(b)(2) 62a

Other Authorities

Professor Ira P. Robbins, "The Habeas Corpus Certificate of Probable Cause," 44 OHIO ST. L. J. 307 (1983) 24

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TERRY J. O'REAR, Petitioner, pro se

V.

ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

The petitioner, TERRY J. O'REAR, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on May 14, 1987.

OPINIONS BELOW

The Order and decision rendered by the 7th Circuit Court denying petitioner a certificate of probable cause entered on 05-14-87 is reprinted and attached

hereto as Appendix A; it was unreported. That Court's unreported Order denying a petition for rehearing entered on 08-12-87 is reprinted and attached hereto as Appendix B.

The prior unreported Order of the U. S. District Court for the W.D. of Wisc. (Shabaz, D.J.) denying a certificate of probable cause entered on 03-27-87 is reprinted and attached hereto as Appendix C. The unreported 6-page Final Order of the District Court dismissing petitioner's petition for a writ of habeas corpus (under 28 USC Sect. 2254) entered on March 4, 1987 is reprinted and attached hereto as Appendix D. The Preliminary Order to show cause issued on 01-12-87 by the District Court is reprinted and attached hereto as Appendix E.

JURISDICTION

On 05-14-87 the 7th Circuit Court of Appeals entered judgment denying petition-

er's application for a certificate of probable cause (App. A). On 08-12-87 the 7th Circuit Court denied petitioner's timely petition for rehearing with suggestion for rehearing en banc (App. B). On 10-30-87 Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including 12-10-87. On 12-04-87 Justice Stevens further ordered that the time for filing this petition for writ of certiorari be extended to and including January 9, 1988. The jurisdiction of This Court to review the judgment of the 7th Circuit Court is invoked under 28 U.S.C. Section 1254(1).

Jurisdiction is further invoked under 28 U.S.C. Sect. 1651, which authorizes This Court to review both "the action of the court of appeals in decling to allow an appeal to it" and the "questions on the merits sought to be raised by the appeal." House v. Mayo (1945) 324 U.S. 42, 44-5, as

noted in Davis v. Jacobs, (1981) 454 U.S. 911, 912-3. The 'questions on the merits sought to be raised by the appeal' are those that concern petitioner's petition for a writ of habeas corpus, filed under 28 U.S.C. 2254 on Dec. 31, 1986 in the W.D. of Wisc., and the Orders of the W.D. of Wisc. (Shabaz, D.J.) of 01-12-87 (App. E), 03-04-87 (App. D), and 03-27-87 (App. C). The following decisions sustain the power and jurisdiction of This Court to personally review petitioner's original habeas petition filed on 12-31-86 and/or the Judgment and Orders of the District Court, or of This Court to, alternatively, itself grant the requested certificate of probable cause so as to appeal to the Circuit Court: House v. Mayo, 324 U.S. 42 (1945); In re Hunt, 348 U.S. 968 (1955); Burwell v. Teets, 350 U.S. 808 (1955); Rogers v. Teets, 350 U.S. 809 (1955); Rosoto v. Warden, 374 U.S. 201 (1963);

Nowakowski v. Maroney, 386 U.S. 542 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Smith v. Digmon, 434 U.S. 332 (1978); Davis v. Jacobs, 454 U.S. 911 (1981); and Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986; per curiam). The special circumstances which warrant exercise by This Court of its discretionary power to issue the common law writ of certiorari as requested are set forth below under the heading "Reasons for Granting Writ".

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional Provisions involved are the Due Process and Equal Protection clauses of the 5th and 14th Amendments to the U.S. Constitution and the habeas corpus clause of Article I, Sect. 9. (the relevant portions thereof are reprinted in Appendix F (pp. 21a - 22a infra).

Appendix F (pp. 22a - 27a) sets forth the relevant portions of the following Federal Statutes (1986): Sections 1254(1);

1651; 2241(c)(3); 2253; and 2254 of Title 28 of the United States Code.

Appendix F (pp. 27a - 29a infra) sets forth the following Regulations which have served to implement 28 USC 2253 & 2254 noted immediately above: a) Rule 22(b) of the Federal Rules of Appellate Procedure (1967; 1986); and b) Rule 1 of the Rules Governing Section 2254 Cases in the United States District Courts as adopted by the Supreme Court of the United States (1976; 1986).

STATEMENT OF THE CASE

This case originates out of the criminal conviction of Terry J. O'Rear. Sentence was imposed on 04-27-81 by the Wisconsin State Circuit Court for Dane County, Branch 6 (Madison, Wisc.) Judge James C. Boll presiding, following a 2-day trial and conviction by jury on 01-08-81 (wherein Mr. O'Rear pled NOT GUILTY), as a term of imprisonment in the custody of the Wisc.

Division of Corrections not to exceed 6 years on the charge of 2nd Degree Sexual Assault, Wisc. State Stat. Sect. 940.225 (2)(a), and a concurrent term of not in excess of 1 year on the charge of False Imprisonment, Wisc. S.Stat. Sec. 940.30.

At the time of the origin of this case Mr. O'Rear, then age 29, was a Ph.D. candidate in political science with an excellent academic and teaching record (being the chairperson of the graduate students in polisci at the Univ. of Wisc.-Madison and having been re-hired to teach college level political science courses as a visiting professor at Beloit College) with no previous record of aberrant sexual behavior or felonious criminal behavior (State Intermediate Appeals Court decision of 12-13-82, p. 17). It should be noted that Mr. O'Rear has steadfastly and insistently maintained his innocence of the charges for which he was convicted.

The facts regarding the origin of this case - events of Jan. 1-2, 1980 - were previously presented to the Dist. Court below and are reprinted here as App. G at pp. 30a-45a, infra. (Please see). The claims of error in the State conviction below (presented to the State Courts after verdict) are reprinted in App. J at pp. 62a-65a, infra, as presented to the District Court on 12-31-86. (Please see).

On 11-16-81 the Trial Court denied motions for post-conviction relief. But there the Trial Court admitted that error had occured during the jury trial in regard to the testimony of the policewoman as to evidence lost by the police (pt. 2, p. 64a infra). The Trial Court stated: "the reason that the prosecution introduced that evidence was because they thought it would bolster their case." (R76, 113). But concluded that it was "harmless error." (R76, 116). However, the Trial Court did not

make any inquiry into how or why the loss happened, nor was any inquiry made into the degree of negligence on behalf of the State.

Thereafter, through his appellate counsels, Mr. O'Rear appealed his conviction to the intermediate Wisconsin Court of Appeals (District IV). That court affirmed his conviction, denied his appeal, and disagreed with the 'harmless error' finding of the trial court in its unpublished 18-page decision dated 12-13-82. (A copy being included in Federal doc. no. 1a below). The State appeals court, acting only on written briefs and without any hearings of any kind, and basing its written finding in large part upon two bench trial decisions from intermediate state appeals courts in Illinois, refused to review the trial court's finding of 'harmless error' because according to the Wisc. appeals court: "considering the

lack of evidence that it [the cigarette butt] was lost, misplaced or destroyed" no error occured (Opinion of 12-13-82, p. 7). Until that finding none of the parties in the dispute had denied that the butt had been lost by the police and the Trial Court had affirmed the fact that it was lost at the Post-Conviction Hearing. The State appeals court also determined that none of the other errors presented (i.e. - listed here at pp. 62a-65a, infra) was a reversable error, basing each determination separately upon the Court's allegations of what the defendant's trial counsel did, could have done, or didn't do in isolation from one another (Ibid., passim).

A timely petition for review of the state appellate ruling was submitted to the Supreme Court of the State of Wisc. That petition was denied review in a one-line sentence of denial (without reasons) on 03-09-83. It too being unpublished.

Two months thereafter Mr. O'Rear was granted an early parole due to his above average good behavior in prison by the State Parole Bd. The facts concerning the period between O'Rear's release from prison until the filing of his habeas petition were previously presented to the District Court below and have been reprinted and attached hereto as Appendix G at pp. 45a-53a infra (which please see).

Because of the State's intervention in the habeas filing process by their unexpected, unannounced, and speeded-up discharge of Mr. O'Rear from his parole after his meeting with officials of the District Court concerning his filing while still on parole, within his supporting brief of 12-31-86 (doc. 1a below) Mr. O'Rear included 3 arguments as to why standing should attach in his case despite his discharge from parole.

Following the receipt of Mr. O'Rear's

pro se habeas documents (numbered 1 & 1a below) the District Court for the W.D. of Wisc. (Shabaz, D.J.) issued a Preliminary (show cause) Order wherein it rejected one of Mr. O'Rear's 3 "custody" arguments outright without listing any supportive law or case law. The Court did not reject the other 2 'custody' arguments at that time, but called upon the respondent to respond thereto. (see App. E at pp. 17a-20a infra).

Thereafter, the Respondent filed a Motion (& brief) to dismiss the habeas petition on the ground that Mr. O'Rear was not 'in custody.' (doc. 4 & 5 below). In response Mr. O'Rear filed a traverse and a brief and 2 affidavits in support of the traverse (docs. no. 6-9), a motion to dismiss the respondents reply (doc. 12), and a motion (& brief) requesting reconsideration of the earier (Jan. 12th) rejection of one of the "custody" arguments (doc. no. 10 & 11). Following the receipt of these

materials the District Court in a 6-page unpublished Order of 03-04-87 denied Mr. O'Rear's motion for a dismissal of the respondent's reply, denied Mr. O'Rear's motion for reconsideration, granted the Respondent's motion for dismissal, and dismissed Mr. O'Rear's petition for a writ of habeas corpus. (see App. D at pp. 7a-16a infra). Also on 03-04-87 the District Court entered in formal Final Judgment dismissing the habeas petition (doc. no. 14 below).

In the Order of 03-04-87 the District Court dismissed Mr. O'Rear's habeas petition solely upon jurisdictional grounds (finding him not be be "in custody within the meaning of 28 U.S.C. Sect. 2254" (App. D at p. 16a infra) without reviewing or addressing or discussing the 'merits' of Mr. O'Rear's habeas petition and his allegations of unconstitutional unfairness in the State trial below. While

the Court admitted (at App. D, p. 10a) that Petitioner still had 2 arguments regarding 'custody' on the table (those stemming from "the general collateral consequences of his conviction" and those stemming from "restraints on his movements"), the Court only discussed the former and ignored the latter in reaching its final conclusion of dismissal. It also admitted that there was no direct precedent for its actions from previous rulings of the 7th Circuit Court or This Court. (App. D at p. 11a-12a & 13a infra).

Thereafter, on 03-26-87, Mr. O'Rear filed a timely notice of appeal of the District Court's action of 03-04-87 and paid the requisite filing fees.(doc. no. 17 below). Also on 03-26-87 and pursuant to F.R.A.P. 22(b) Mr. O'Rear filed a Motion for a Certificate of Probable Cause (C-P-C) and an Affirmation in support of the Motion (doc. no. 18 & 19). The very

next day, 03-27-87, the District Court issued an unreported Order denying the Certificate. (App. C, pp. 5a-6a infra). No reasons were listed for the denial.

Thereafter on 04-09-87 Mr. O'Rear filed a timely Application and Petition for a C-P-C with the U.S.C.A. for the 7th Circuit. Acting on behalf of the 7th Circuit, the Hon. Bauer, C.J. and Coffey, J. denied the requested Certificate in an unreported Order dated 05-14-87. (App. A). Therein, the Circuit Court made note of their belief that Mr. O'Rear had "failed to demonstrate that he should prevail on the merits" as grounds for the denial. On 05-27-87 Mr. O'Rear filed a timely Petition for Rehearing, with an en banc suggestion. Again acting on behalf of the 7th Circuit Court the same two judges, again in an unpublished and unsigned Order, dated 08-12-87, denied the request. (App. B, pp. 3a-4a infra).

REASONS FOR GRANTING THE WRIT

I. The 7th Circuit's ruling that a habeas applicant seeking a C-P-C must "demonstrate that he should prevail on the merits" is at odds with the meaning, intent & language of This Court's ruling in Barefoot and conflicts with decisions of other Circuit Courts.

Following Petitioner's presentations of 04-08-87 requesting a Certificate of Probable Cause (C-P-C), in an unreported Order dated 05-14-87 the 7th Circuit Court denied the requisite C-P-C. The basis for that denial is found in the 2nd paragraph of that Order, which is reprinted and attached hereto in Appendix A at pp. 1a-2a infra (which please see).

It is Petitioner's contention that this Order of 05-14-87 misrepresents the original statement and intent of This Court upon which said Order claims to be based. This becomes apparent when one reads the complete text of note 4 of Barefoot v. Estelle, 463, U.S. 880, 893, n. 4 (1983) as well as the text of the sentence in the

Opinion proper which preceded the notation, which has been reprinted here as Appendix H at p. 54a *infra* (which *please see*) and compares this with the text used by the 7th Circuit's Order of 05-14-87 (*see* App. A at p. 1a-2a) and again used in its Order of 08-12-87 (*see* App. B at pp. 3a-4a *infra*). Two things become immediately apparent in such a comparison. First, the 7th Circuit paraphrased the *Barefoot* text into one sentence of 5 clauses, with each clause originating in *Barefoot*. Secondly, the Circuit Court has mistakenly transformed and misapprehended the meaning of *Barefoot*. This is most apparent in the 2nd clause of the 5-clause sentence where we find the Circuit Court stating: "petitioner has failed to demonstrate that he *should* prevail on the merits." This is *not* what this Court said in *Barefoot*! For This Supreme Court says: "obviously the petitioner need *not* show that he *should* pre-

vail on the merits." Barefoot, supra, U.S. at 893, n. 4 - emphasis added. Clearly the 2nd clause of the 5-clause ruling sentence of the Circuit Order of 05-14-87 is at odds with This Court's decision in Barefoot! Moreover, under This Court's standard (found in n. 4 of Barefoot) one finds that "in requiring a...'substantial showing of the denial of (a) federal right' ...the petitioner must demonstrate" three possible alternative conditions. (App. H). The paraphrase used by the 7th Circuit does not clearly indicate that clause no. 1 of its 5-clause sentence is defined by any or all of the subsequent clauses. Under the 7th Circuit's version clause no. 1 could be viewed as a separate and distinct concept. Hence, the 7th Circuit's paraphrase has further clouded the original meaning of Barefoot by improperly lumping the defining sub-clauses together with the clause they were meant to define.

That the 7th Circuit's use/misuse of Barefoot is off-base is underlined by the way the Barefoot standard is used and interpreted on the matter of the issuance of a C-P-C by several other Circuit Courts; particularly in regard to the 7th Circuit's misconstruction that requires a petitioner "to demonstrate that he should prevail on the merits." As the 9th Circuit has directly noted in regard to such a requirement:

> [R]equiring the defendant to demonstrate to the district court that its ruling is likely to result in reversal is tantamount to requiring the district court to certify that it believes its ruling to be erroneous. U.S. v. Handy, 761 F.2d 1279, 1281 (9th Cir.1985)

There the 9th Circuit went on to use Barefoot at n. 4 to conclude that "a 'substantial question' is one that is fairly debatable'" and "that poses issues '"debatable among jurists of reason."'" Handy, supra, at 1281-2. Likewise, both the 11th and 5th Circuit Courts have centered their interpretations upon whether

the petitioner can show that his 'issues are debatable among jurists of reason.'[1] In numerous other cases the 5th Circuit Court (unlike the 7th Circuit in the present case) has quoted the Barefoot citation in question (found here in App. H) in context and often completely without paraphrasing it,[2] and thus not misconstrued it.

That the Petitioner here met the proper Barefoot standard by presenting rational argument on the tendered issues, by establishing that his "issues are debatable among jurists of reason" is shown in the presentations found in Heading III below. Hence it was improper for the 7th Circuit

---

[1]See: Fleming v. Kemp, 794 F.2d 1498, 1490 (11th Cir.1986; per curiam); Brogdon v. Blackburn, 790 F.2d 1164, 1167 (5th Cir. 1986;p.c.); & Johnson v. McCotter, 794 F.2d 1011, 1012 (5th Cir.1986; p.c.).

[2]Here see: Flowers v. Blackburn, 764 F.2d 276, 277 (5th Cir.1985; p.c.); O'Bryan v. McKaskle, 729 F.2d 991, 994 (5th Cir.1984; p.c.); Woolls v. McCotter, 798 F.2d 695, 697 (5th Cir.1986); & Fabian v. Reed, 714 F.2d 39, 40 (5th Cir.1983; p.c.).

to so summarily deny the requisite C-P-C and thus prevent review of the District Court's dismissal Order of 03-04-87.

Thus it is quite apparent that the 7th Circuit is out of step with other Circuits and that its use of Barefoot is quite apparently a misuse, if not a direct contradiction, of the standard when it turned a could situation (i.e. - a possibility) into a should situation (i.e. - a requirement). If the 7th Circuit's ruling of 05-14-87 in this case is allowed to stand, the 7th Circuit Court will undoubtedly continue to make such rulings, continue to create further confusion and misinterpretation of the intentions of This Court, and continue to improperly summarily deny the possibility of review to an entire class of State habeas petitioners who must have a C-P-C to have their appeals considered. Hence consideration of the matter by This Court is essential.

II. The District Court's Order denying a Certificate of Probable Cause failed to list the reasons for its conclusion and hence is in violation of the standing requirements of the 7th Circuit & other Circuits and of the guidelines of F.R.A.P. 22(b) as established by This Court. The Circuit Court should have acted sua sponte to enforce its own rules and guidelines.

Since 1959 the following has been the ruling standard for District Courts in the 7th Circuit concerning applications for a Certificate of Probable Cause:

> All District Courts in the Circuit are advised that hereafter, when a certificate is entered that an appeal is not taken in good faith, such certificate shall be accompanied by a statement of the reasons for such conclusion. U.S. ex rel. Breedlove v. Dowd, 269 F2d 693 at 693 (7th Cir. 1959)-emphasis added.

Petitioner requests that the reader now turn and read attached Appendix C at 5a-6a infra (i.e. - the denial Order of 03-27-87 of the W.D. of Wisc.). To accept the District Court's ruling of 03-27-87 as containing 'reasons' for denying a C-P-C would require a "leap of faith" that is

itself not acceptable in the Federal judicial system. That the District Court here did not meet the Federal Standard in its March 27th Order (reprinted here as App. C) is made quite clear by the following succinct statement made by the 10th Circuit when discussing F.R.AP. 22(b):

> Clearly the rule imposes a responsibility on a district judge to issue a certificate or a statement detailing his reasons for declining to confer one. Gardner v. Pogue, 558 F.2d 548, 550 (9thCir.1977).
>
> Herrera v. Payne, 673 F.2d 307, 308 (1982) - emp. added

Commenting on same, the E.D. of Vir. Court, after directly referencing Barefoot, supra, went on to state:

> !A!n abbreviated expression of the reasons for denial would be of no use to the judges of the court of appeals in exercising their own judgment as to whether or not to grant a certificate of probable cause.
>
> Brown v. Booker, 622 F.Supp. 993, 997 (E.D. Va.1985)

And why is it improper?- because the District Court's ruling and the proper exercise of its discretion "can-

not be adequately reviewed where no reasons for the determination have been given." Herrera, supra, 673 F.2d 307, 308 (10th Cir.1982). Hence the W.D. of Wisconsin's ruling of 03-27-87 improperly inhibited an adequate and full review of its earlier Order of 03-04-87 by the Circuit Court.

The danger of allowing the District Court's unexplained action of 03-27-87 (App. C) to stand would permit that Court to so improperly insulate its earlier dismissal Order of 03-04-87 (App. D) from proper review and to also encourage such improper behavior in the future. The reality of this danger was best put thusly:

> If a judge were not required even to minimally justify his decisions, a circuit judge who is opposed to the use of habeas by state prisoners very easily could simply deny the certificate. The decision effectively would be insulated from review.
>
> Robbins, Ira P., "The Habeas Corpus Certificate of Probable Cause, 44 OHIO S L J 307, 331 (1983)

Petitioner fears this may be occur-

ing here. Petitioner made a similar presentation in his Petition for a C-P-C of 04-08-87 addressed to the 7th Circuit absent case law documentation (at p. 4, par. 9-a). The 7th Circuit ignored this presentation entirely when it issued its own summary denial Order of 05-14-87 (i.e.- App. A infra). The 7th Circuit Court surely knows its own case law and the Federal guidelines governing District Court's behavior in denying C-P-C's and should act to enforce same sur sponte without having a pro se habeas petitioner first cite the chapter & verse. Not to act so is contrary to the basic principal of judicial fairness. Moreover, Petitioner has been informed by an employee of the Wis. W.D. Court that to their best recollection, Judge Shabaz has not issued a C-P-C since assuming the Federal bench in 1981 for any pro se State habeas Sec. 2254 applicant-petitioner following either a dismissal or

denial of the original habeas petition. That is, it appears that a certain class of petitioners are routinely being denied the right to a C-P-C and to review by the Court below and apparently (given its actions here) without consideration of the established Federal rules and guidelines that require a list of specific reasons within the text of any Order denying a C-P-C. And, the 7th Circuit has done nothing to prevent this from continuing.

As the 10th Circuit noted: "rules seldom contemplate what will happen if they are disregarded." Herrera, supra, at 308. Yet, if This Court allows lower Courts to flaunt the existing guidelines and rules for State habeas cases, these guidelines and rules have become nothing more than a tragic farce. If District Courts are allowed to so insulate their rulings in State habeas cases from review then This Court is also allowing a de facto

suspension of the privilege of federal habeas corpus for petitioner's convicted in State Courts. That is a direct violation of Art. 1, Sect. 9 of the U.S. Constitution. That is neither Constitutional nor proper, but more like what was found under the 'Rechtstaat' system in Germany in the 1930's where rules were bent and ignored whenever it suited the social schemes of the prosecutors and those in power. Unless checked by This Court such failure to follow the established rules and guidelines will undoubtedly continue unabated to the detriment not only of the habeas petitioners themselves but also to the principals of justice and the rule of law which is supposedly how the pundits say this nation is to be differentiated from others.

Hence consideration of the matter by This Court is essential.

III. The District Court's Order dismissing petitioner's habeas petition on jurisdictional grounds is at odds with rulings of other Federal Courts and with interpretations of rulings of This Court as made by other Courts and 'jurists of reason' and it failed to consider the 'totality of the circumstances' involved. Given the variety of interpretations of different jurisdictions and the continued confusion on the issue of 'custody for the purposes of habeas review' and the need for a clear national standard, the time is ripe for This Court to clarify whether 'custody for the purposes of habeas review' can be established by any or all of the three situational arguments outlined hereunder as A, B, & C.

Since the District Court neither reviewed nor addressed the 'merits' of the habeas petition itself in the Court's Final Judgment and Order of 03-04-87 (App. D, infra), but ruled solely upon the collateral issues of jurisdiction, standing, and custody, Petitioner's subsequent appeal of said Order has come to also center upon these collateral issues instead of to center solely upon the 'merits' of the allegations of error in the State process below. It is Petitioner's belief that his arguments

relating to standing outlined below are worthy of further and full appellate review under the Barefoot guidelines and the refusal of the Courts below to grant a C-P-C so as to secure full review of these issues, as well as the possibility of review of the 'merits' of the habeas petition alleging error in the State trial below, was improper. It also is Petitioner's belief that when the "totality of circumstances" are considered 'custody' should be found.

A. On Argument/Collateral-Jurisdictional Issue No. 1: Custody for the purposes of habeas review can be established when a situation has been created by the State's independent intervention, whereunder a petitioner is forced to have his habeas documents 'date stamped' (a/k/a 'filed') after he has been discharged from paroled custody, such State action constitutes 'just cause' to excuse any procedural default found in petitioner's inability to obtain a 'date stamp' on his habeas documents prior to his discharge from parole, and such a habeas petition can be considered to be 'effectively filed' prior to the forced discharge date, particularly when petitioner's intent to file was clearly established before officials of the Federal District Court prior to such intervention.[3]

It is clearly established by the facts of this case that Mr. O'Rear was not discharged from his parole & sentence and that he was unaware that the State was soon to discharge him when he obtained the necessary informational materials and forms to file a habeas action, after having drafted a brief, from the officies of the W.D. Court on 08-14-85 and when he met with the pro se clerk for 45 minutes on 08-20-85. It is also clear that the petitioner did not request such discharge and that the discharge came as a complete suprise when

---

[3]This argument was originally put to the Dist. Court at pp. 25-6 of doc. 1a (Brief of 12-31-86) & also in doc. 11 (reconsideration brief of 02-24-87). The Court dismissed the initial presentation of 12-31-86 outright in its Preliminary Order of 01-14-87 at unnumbered par. 4 without any citation or reference to law or case law. (see App. E, infra). The Dist. Court similarly denied the reconsideration request of 02-24-87, again without supportive law or case law, at par. 1 of p. 2 of its Order of 03-04-87 (see App. D, at pp. 8a-9a infra). 3 Whether-type questions on this argument were included in doc. no. 19 (03-26-87 request for C-P-C) & are reprinted here in App. I, at pp. 55a-56a, infra.

handed to him on 08-22-85 by his parole agent. It is further clear that Mr. O'Rear had been led to believe that he would be on parole until Jan. 8, 1987. Moreover, were it not for his exemplary behavior while in prison and on parole he would never have been discharged 1½ years earlier than scheduled.[4] Had he been less than a model inmate and parolee, had he violated the 'rules of his parole,' then he would clearly still have been in paroled custody, if not imprisoned custody, when his habeas papers were 'date stamped' on Dec. 31, 1986. That is, because Petitioner was a model parolee the Respondent and the District Court below have denied him the rights to habeas corpus which would clearly be granted him were he a disruptive and violent parolee, who would never be grant-

[4] Affidavit of 02-24-87 at par. 21-4 (doc. no. 7 below); pp. 2-4 of doc. 11 below; & pp. 2-5 of doc. 1a. See also App. G at pp. 45a - 53a infra, which is a reprint of pp. 2-5 of doc. 1a below.

ed an early discharge. Why should a model non-violent parolee be denied the rights granted to a non-model violent parolee? It makes no sense for the very behavior of rule-abidance and non-violence to be what is used by the Respondent to prevent the Federal system from examining the claim that the State process below was constitutionally flawed. Especially because rule-abidence and non-violence directly speak to what the Petitioner has consistently maintained: that he is an innocent non-violent human being.

Petitioner contends that the 'filing of a petition of habeas corpus' is a process that is more than the simple stamping of a 'date stamp' upon the face of a document. The document must be conceived of and written up before it can be 'date stamped.' Thus there are actions that pre-date the obtaining of that 'date-stamp' on the face of the document. It was quite clear to the

officials of the District Court - especially after his meeting with the pro se clerk - that Mr. O'Rear was 'in the process' of 'applying for' and of 'filing' a petition for habeas corpus prior to his unexpected and speeded-up discharge. The sole reason that the final steps of the 'filing process' (i.e.- the printing of the documents & having them 'date stamped') were not completed while on parole was that the State of Wis. intervened in the process by unexpectedly and without warning discharging Mr. O'Rear from his parole. Then after so intervening in the habeas process, the State of Wis. was in the position to argue (as it has) that Petitioner was not 'in custody' under Sec. 2254 at the time that he obtained a 'date stamp' on his habeas documents. Moreover, the State of Wis. was aware prior to discharging him that Mr. O'Rear was researching the law and in the process of filing for a writ of habeas corpus in the

Federal court system - this is so because the State Parole authorities (and in particular his parole agent) knew that Mr. O'Rear continued to maintain his innocence, clearly stated that he was appealing his conviction into the federal system, and was regularly engaged in researching the law to accomplish the goal of federal review and possible vindication.

Here Petitioner has shown that "some objective factor external to the defense" (i.e. - the State's early, speeded-up, unexpected act of discharging the Petitioner) "impeded counsel's efforts to comply" with the 'procedural rule' (i.e. - impeded and prevented the pro se Petitioner from getting a 'date stamp' on his petition dated before his discharge and thus prevented him from formalizing his habeas filing de jure while on parole). He has shown "some interference by officals" (Brown v. Allen, (1953) 344 U.S. 443, 486) which This Court

still recognizes as an 'objective impediment to compliance with a procedural rule.' Murray v. Carrier, 106 S.Ct. 2639, 2646 (1986). Hence Petitioner contends that if there was a 'procedural default' in not getting a 'date stamp' on his habeas documents prior to his release from parole, then there is just cause to excuse such a 'procedural default.' This then would allow a Federal Court to proceed to review the 'merits' of the petition. Moreover, since other Federal Courts in other situations have allowed habeas petitioners to proceed by considering the petition to be filed on a date other than that found in the 'date stamp' placed on the face of the habeas document(s),[5] it is possible for the Court here to consider this habeas petition filed prior to the State's intervention (when Petitioner clearly indicated

[5] E.g. - Carter v. Procunier, 755 F.2d 1126, 1128 (5th Cir.1985) & Passic v. State, 98 F.Supp. 1015, 1016 (E.D.Mich.S.D.1951).

to the Court officials on Aug. 14 & 20, 1985 that he was in the process of filing his habeas documents while still in paroled custody) thereby assuming the existence of 'custody' and allowing the Court to proceed to the 'merits' of the Petitioner's claim.[6]

To allow the State to get away with what happened here is only to encourage such improper interference with the rights of paroled inmates in the future by States who wish to insulate the behavior of their State Court systems from Federal review. Given the precedent established here, all a State has to do upon learning that a given parolee is planning to file a habeas petition is to unexpectedly, hurriedly, and without warning discharge that parolee before he has obtained a 'date stamp' on his documents. Prior to Jones v. Cunningham, 371 U.S. 236 (1963) the process and

---

[6] See also: Nelson v. Lefkowitz, 428 F.Supp. 660, 661 (S.D.N.Y.1977) based on: Harris v. Nelson, 394 U.S. 286, 291 (1969).

game plan of such State Respondents was similar: where if an inmate filed a habeas petition while in prison, the State released him from prison, put him on parole, and then claimed the Federal Courts had no jurisdiction since he was no longer a prison inmate. Likewise, prior to Carafas v. LaVallee, 391 U.S. 234 (1968): when a parolee filed prior to discharge, the State could release the parolee, and go on to claim that the Federal Courts had no jurisdiction as he was no longer on parole. This Court in its wisdom in Jones and Carafas (and in too numerous other occasions) saw through the game plan of the State Respondent(s), saw how they were attempting to hobble the Writ, hamstring justice, and insulate their State courts from Federal review with procedural and jurisdictional arguments and barriers. Justice and review mustn't be allowed to be denied in the manner attempted here either!

B. On Argument/Collateral-Jurisdictional Issue No. 2: Restraints on Movement are a recognized special 'restraint on individual liberty'; and such restraints placed upon a petitioner's recognized right to international travel & movement establish 'custody for the purposes of habeas review,' particularly when such travel is required by petitioner's trade, occupation, or field of study.[7]

Petitioner contends that "custody for the purposes of habeas review" is established in this case due to restrictions and restraints placed on his 'right to international travel and movement.' He further contends that such 'restraints on individ-

[7]Presentations of this argument before the District Court were: on 12-31-87 at pp. 27-33 of doc. 1a; on 02-24-87 at pp. 13-26 of doc. no. 9 & within the 2 Affidavits of 02-24-87 (docs. no. 7 & 8 below). Petitioner also listed 5 whether-type questions as part of this Argument in his Application for a C-P-C filed in the Dist. Ct. on 03-26-87 at pp. 6-7 of doc. no. 19. These 5 whether-type questions have been reprinted and attached hereto as part of Appendix I at pp. 56a-58a infra. However, the Dist. Ct. ignored this entire "movement" argument & instead made its determinations solely upon Argument C below in its Order of 03-04-87 (App. D, infra), and as noted earlier, its Order of 03-27-87 contained no reasons regarding any argument. Refusing to discuss or review an entire line of argument was also improper!

ual movement' are a special denial of his "individual liberty" when based upon a constitutionally infirm and unjust conviction, as alleged here, as it denies this citizen's "liberty: to 'move where he chooses' and 'go where he will' and to do this thing (here travel, study, and reside for the purposes of research and employment abroad) that all free citizens "are entitled to do." (phrases seen significant by This Court in Jones v. Cunningham, (1963) 371 U.S. 236). That these are real potential restraints upon Petitioner's liberty stem from the foreign study and research requirements of his University for the completion of his Ph.D. degree in Comparative Politics of W. European Nations and are explicitly shown, outlined and discussed below.[8]

---

[8] In: Petitioner's Affidavit of 02-24-87 (doc. 7 at parg. 2-10), Affidavit of petitioner's Professor, David W. Tarr (doc. no. 8); and also see petitioner's "Traverse

-note continues on next p.-

As This Court pointed out in Jones, supra, the original conception of the Writ of habeas corpus in the English Common Law was as a remedy for unlawful restriction on physical mobility.[9] That is Common Law and the English Courts held that restrictions upon one's physical mobility and freedom of movement allowed a petitioner to invoke the rights of the forerunner of all habeas corpus acts (the Habeas Corpus Act of 1679, 31 Car. II, c. 2). And habeas rights should invoke here too, as Mr. O'Rear's freedom of movement is likewise currently restricted; he cannot go where he pleases, nor can he

---

8- cont'd-
Brief" of 02-24-87 at pp. 16-7 & 22-4 (doc. no. 9) & his brief of 12-31-86 at pp. 27-33.

[9]For example in 1722 the Kings Bench in Rex v. Clarkson felt that the primary test for holding that habeas corpus was appropriate in determining whether a woman was being constrained or not was "simply whether she was 'at her liberty to go where she please[d],'" Jones, supra, U.S. at 239 (1963) quoting Rex v. Clarkson, 1 Str. 444, 445, 93 Eng. Rep. 625. See also: Rex v. Delabal, 3 Burr 1434, 1437, 97 Eng. Rep. 913, 914 (Kings Bench, 1763).

go where he will, and this restriction is not shared by the free men of this country.

It is Petitioner's contention that since habeas rights extend to situations where a non-citizen alien is restrained from movement into the U.S.A. due to actions based upon American law, the converse should and must extend to a situation where a citizen is restrained from movement out of the U.S. due to actions based upon American law.[10] Not to grant the converse situation to a citizen habeas petitioner, whose right to international movement is being impeded because of an alleged unconstitutional State conviction,[11] is to make

---

[10] Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956); Shaughessy v. U.S. ex rel. Mezei, 345 U.S. 206 (1953); U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); U.S. v. Jung Ah Lung 124 U.S. 621, 626 (1888); & Jones, supra, U.S. at 239-40.

[11] For Mr. O'Rear will be restrained from movement into other nations solely based upon the fact that he has a conviction in Dane County Wisconsin, U.S.A. for a case involving moral turpitude. The actions of the customs officials of -cont-

a mockery of citizenship and to stand justice and the original intent of the Great Writ on its head.

The 9th Circuit recently affirmed a case which clearly recognized that a restraint placed on one's right to international travel is a "restraint on an individual's liberty" and "of sufficient collateral consequence" to find a petitioner "in custody for the purposes of habeas corpus review." Lesbian/Gay Freedom Day Committee, Inc. v. U.S. I.N.S., 541 F. Supp 569, 576 (N.D. Ca.1982), aff'd

---

11-cont'd-
foreign governments (as noted and specified below at doc. 7, par. 7 on pp. 4-5 (Affidavit of 02-24-87) & in doc. 9 (traverse brief of 02-24-87) at 22-4 following consultation with the listed governments) will be based upon the fact of the Wisconsin/American conviction. Were it not for that conviction they would not restrain him. The American conviction then is the prime mover & motivator of the subsequent actions of the foreign customs officials. Only if that American conviction is removed will the subsequent actions of the foreign customs officials be modified and will the restraint and restriction on Mr. O'Rear's freedom of movement be removed.

714 F.2d 1470 (9th Cir.1983). The District Court in that case pointed out that the petitioner there would be excluded from the USA because of the finding of the Bd. of Immigration Appeals that he was a confirmed homosexual and that each time he would seek entry the "immigration inspector is obligated" to follow his departmental policies & procedures and order Mr. Hill "excluded as a homosexual." The Court then went on to state that: "Unless Hill chooses to try to prove that he is no longer a homosexual the decision of the Board...will preclude his entry." Such a result was what the Court there found to be of "significant restraint" to establish a finding of "'in custody' for the purposes of habeas corpus review." Id at 576.

As Mr. O'Rear established via his affidavits and arguments below, in his case he would be excluded from entering European nations for the purposes of

graduate study & research because of the finding of the Wisc. Court that he was guilty of 2nd degree sexual assault; and that each time he would seek entry the officials would be obligated to follow their departmental policies & procedures and order him excluded as a felon convicted of a crime of moral turpitude; and that unless he chooses to try to prove that he no longer is a felon convicted of a crime of moral turpitude, the decision of the Wisconsin Court will preclude his entry into European nations. How could Mr. O'Rear prove that? The only way he could hope to do so would be via having relief flow from the instant petition for a Writ of habeas corpus.

Not to grant a finding of custody and full review here when aliens have been granted such in parallel situations would mean that justice is a one-way street upon which aliens have more rights than do citizens

and that there exists a de facto category of 2nd-class citizenship. If this petitioner can not have a chance at being a 1st-class citizen again and is not allowed entry into foreign nations because of the constitutionally flawed Wisc. conviction, then what has been created? A man without full citizenship rights anywhere? A man without a country? Is that justice?

C. On Argument/Collateral-Jurisdictional Issue No. 3: General Collateral Consequences which directly flow from a petitioner's conviction (that originally resulted in his imprisonment & complete loss of liberty) and which continue to restrain him in a variety of ways even after his having been discharged from parole are of sufficient and severe enough restraint on his individual liberty so as to establish custody for the purposes of habeas review.

Petitioner contends that 'custody for the purposes of habeas review' is established in the instant case due to the 'currently existing "general" collateral consequences' of his State conviction.[12]

[12]This argument was presented to the District Court below in petitioner's -cont-

These types of adverse 'collateral consequences' and 'disabilities' which continue to flow from his conviction despite the fact that he was discharged from his formal sentence and which still constitute sufficient "restraints not shared by the public generally" were specifically listed and enumerated in Petitioner's Affidavit of 02-24-87 (doc. no. 7 below) at paragraphs 9, 12-15 & 17-19.[13] Even the District Court admitted that the petitioner has suffered the loss of "valuable rights." (Appendix D at 14a-15a infra).

The action of the District Court here

12-cont'd-
original brief of 12-31-86 (doc. 1a) at pp. 22-4 & in his "Traverse Brief" of 02-24-87 (doc. 9) at pp. 26-91.

[13]Included within this listing were those collateral consequences cited in Evitts v. Lucey, 469 U.S. 387, 391, n. 4 (1985) - (at doc. 7, par. 14); those legal & criminal "collateral consequences" in the State of Wisc. including possible sentence enhancement, impeachment of testimony, availability of bail etc. (at par. 17); & the denial of numerous specific types of employment in Wisconsin by State Statute (at par. 18 & 19).

in rejecting this argument stands in contrast to the following jurists of reason; hence there is adequate justification for a finding that this argument is "fairly debatable among jurists of reason"; and hence under Barefoot the petitioner should be granted the right to further and full appellate review.

In Glover v. N. Carolina the E. District Court for N. Car. found that collateral consequences "are sufficient" to give a petitioner:

> standing to challenge his convictions in federal habeas corpus regardless of whether the filing of his petition occured before or after the termination date of the challenged sentences. Glover v. N. C., 301 F. Supp. 364, 368 (1968)

The 5th Circuit has also recently approved of the practice found in Texas where convictions can be attacked by habeas corpus after the sentence has been fully completed "because of the serious collateral consequences arising from a

felony conviction." Escobedo v. Estelle, 650 F.2d 70, 73 (5th Cir.1981). Moreover, the current law in Georgia which grants habeas review because of continuing collateral consequences was clearly founded upon the rulings of This Court, as is found in the following quotation from the case which established this policy there:

> On further consideration of the Carafas case, and later decisions of the United States Supreme Court, (particularly Sibron v. New York, 392 U.S. 40...; Strait v. Laird, 406 U.S. 341,...; and Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484,...), I am of the opinion that the United States Supreme Court has expanded the class of persons who may apply for habeas corpus relief to include persons alleging void convictions, who are suffering collateral consequences their sentences.
>
> Parris v. State, 232 Fa. 687, 208 S.E.2d 483, 496 (Ga.1974) (Grice, C.J. - concurring)

And such rights extend to situations where a petitioner's "probation was terminated prior to the filing of his petition for habeas corpus." Hardinson v. Martin,

254 Ga. 719, 334 S.E.2d 161, 164 (Ga. 1985) - emphais added. See also: Atkins v. Hooper, 234 Ga. 330, 333, 216 S.E.2d 89 Ga.1975). The logic of the 'jurists of reason' in Georgia was used to establish the same rights for habeas petitioners in the state of Washington. See: Matter of Powell, 92 Wash.2d 882, 602 P.2d 711, 714 (Wash.1979). Similarily the Texas and Pennsylvania Court systems used the same rulings of This Court to establish the same rights for habeas applicants suffering continuing collateral consequences of felony convictions.[14]

Even the current Chief Justice of

---

[14]Here see: Commonwealth v. Doria, 468 Pa 534, 539-40, 364 A.2d 322, 325-6 (Pa.1976); Commonwealth v. Rhode, 485 Pa. 404, 402 A.2d 1025 (Pa.1979); Commonwealth v. Markley, 348 Pa.S. 194, 501 A.2d 1137, 1141 (Pa.Super.1985); Ex parte Gusman, 551 S.W. 387, 389 (Tex.Cr. App.1977)- Odom, J. concurring); Ex parte Ornsby, 676 S.W. 2d 130, 132 (Tex.Cr.App.1984); Ex parte Griffin, 679 S.W.2d 15, 16 (Tx.Cr.App. 1984); and Ex parte Oliver, 703 S.W.2d 205, 206 (Tex.Cr.App.1986).

This Court has been on record acknowledging that:

> In Carafas a convicted felon who was neither in prison nor on parole was held to be 'in custody' because the disabilities of his conviction prevented him from engaging in many types of businesses, voting in any state election, or serving as a labor official or juror.
>
> Strait v. Laird, 406 U.S. 341 at 351 (1972) - Rehnquist, J. - dissenting - emphasis added.

Moreover, in the 7th Circuit's ruling in Hanson v. Cir. Court, 591 F.2d 404 (1979), the door was clearly opened for finding 'custody' in the existence of collateral consequences or civil disabilities that flow from prison-time convictions. This is so because while the 7th Circuit Court in Hanson did not find 'habeas custody' in the collateral consequences that befell petitioner Hanson, the reason for the Court's finding was that Hanson had been sentenced to a "fine-only" conviction. As the Court noted: "The conviction therefore simply

did not deprive the petitioner of liberty." Hanson, supra, at 407, n. 6. The fact is that in Hanson the Court centered its evaluation of the 'custodial' situations upon the nature of the original conviction itself rather than upon the nature of the later existing 'collateral consequences' themselves. This was clearly emphasized by the Court. (see Id. at 407, n. 6 & 7 and the constant use of the limiting adjective 'fine only' before the noun 'conviction' throughout the Court's Opinion in Hanson, passim).

In response to Mr. O'Rear's argument regarding 'collateral consequences' establising 'custody' in his case, the District Court below admitted that there was no ruling guidance for such a situation as petitioner's from either This Court or the 7th Circuit Court (see App. D at pp. 11a-13a infra). Without a precedent to follow the District Court then reached

to a one-page *per curiam* ruling of the 8th Circuit stating: "This Court finds the *Harvey v. South Dakota*, 526 F.2d 840 (8th Cir.1976), *cert. denied* 426 U.S. 911 (1976) to be persuasive." (Order of 03-04-87 at p. 5 - see Appendix D at pp. 15a *infra*).

Petitioner had specifically argued how his case was distinguishable from *Harvey* at pp. 61-6 of doc. no. 19. That it is so distinguishable is because of the existence in the instant case of Arguments A & B above and the manner and extent of the collateral consequences listed by this petitioner, etc. However, the District Court simply replied: "Although petitioner argues that his case can be distinguished from *Harvey*, the Court is not convinced. (Order at p. 5, see App. D at p. 15a *infra*). Absolutely *NO* reason was given as to *why* the District Court was not convinced.[15] It should be pointed

[15]That is no reasons were given -cont-

out that Harvey has never been approved by the 7th Circuit Court for use in its Circuit, despite the Circuit Court's clear opportunity to do so if it wished to (e.g.- in Hanson, decided after Harvey). And, neither has This Court approved of the Harvey decision for general use. [16]

15- cont'd-
by the District Court for its lack of: a) consideration/review of the disparity and contradiction that exists between: 1) the rulings of different Federal Courts from outside the 7th Circuit (e.g. - Harvey and Glover) on this issue, and 2) the 8th Circuit's one-page finding in Harvey and the clear intent found in the 7th Circuit's more detailed analysis in Hanson; b) reference to the views of the 'jurists of reason' presented as supporting petitioner's claim (which were noted here, as well, above); c) considering the points as to how the issue could be resolved differently under rulings of the 7th Cir. & in light of the Rehnquist statement in Strait.

[16] The points reiterated in the above paragraph and in n. 15 were also reiterated before the District Court in O'Rear's Application for a C-P-C of 03-26-87 (doc. 19) in the form of 9 whether-type questions steming from this argument (these are reprinted and attached hereto as part of App. I at pp. 58a-61a infra) - but these too were ignored by the Court when it quickly put out its Order of 03-27-87 with no reasons for denial of the C-P-C (App. C).

It seems grossly unfair that had the Petitioner been convicted in Georgia, Washington, Texas or Pennsylvania there would be avenues of State relief based upon the rulings of This Court, but that similar avenues are not available in Wisconsin. It seems grossly unfair that in some Federal Courts O'Rear's 'merits' would have been reviewed, as 'custody' would be found in these same 'collateral consequences' but that the Dist. Court to which he had to present his petition to refuses to grant such 'custody' upon the same circumstances. Hence, the time is ripe for This Court to set down a ruling for all Federal Courts on this issue and to prevent the continued territorial patch-work of disuniformity in rulings, under which geographic location, not just cause or reason, determines whether one's case is reviewed or not.

IV. The 'Merits' of the claims of Constitutional Error in the State process below have Never been reviewed at the Federal level. The Interest of Justice and Fairness demand that the claims of error at least be looked at and noted, if not reviewed or fully addressed, before a habeas petition is summarily dismissed by a District Court on jurisdictional grounds without even noting the claims of error.

Mr. O'Rear has consistently maintained his innocence on all the charges! The Petitioner contends the Wisconsin Conviction is Constitutionally flawed!

At the Federal level neither the Respondent nor the District Court has denied the unfairness that occured at the State trial.. Instead they have totally ignored the 'merits' of the thing(s) done wrong to Mr. O'Rear. Nor has there been even the slightest attempt by the Federal Courts to date to "determine whether the interest of justice would be better served by addressing the merits of the habeas petition" in this case. Granberry v. Greer, 107 S.Ct. 1671, 1676 (1987).

This despite the following:

It is a fact that No piece of proof offered established that the complainant had been sexually assaulted or physically abused or even had had sexual relations on the night in question. It is also a fact that evidence found in the timely medical exam of the complainant which would have cast doubt upon any violent or sexual crime having occured was not presented before the lay jury at trial. Indeed, Petitioner was convicted solely due to the unconstitutional and unfair nature of his trial: the lay jury was not allowed to view the whole loaf; for proof vital to a fair determination of innocence or guilt was mishandled and lost, testimony was bent and falsely presented, and other evidence, of an exculpatory nature, was not disclosed of properly and fully. While the case was a "classic credibility conflict" between two individuals (defendant vs. complainant),

the State did everything it could -- including unconstitutionally withholding evidence, losing evidence, and bending testimony -- to prevent the credibility of the complainant from being fairly examined by the lay jury - particularly as there was No supportive evidence for her allegations.

It is highly unlikely, that were this case overturned, that the State could successfully prosecute and convict Mr. O'Rear before any jury. As then the false testimony and the improper bolstering of the State's case by allowing in testimony about lost evidence, etc., etc. would not be improperly influencing such a future jury's verdict. Moreover, the timely medical exam which found No evidence of sexual activity or violence would be presented before such a future jury. Such a second jury would learn of the whole loaf - something the jury which wrongfully con-

victed Mr. O'Rear was prevented from doing by the improper actions of the D.A. below. (Listing of the claims of error presented to the State courts below and their refinement into 4 primary substantive whether -type questions as presented to the Federal District Court in Petitioner's doc. no. 1a of 12-31-86 have been reprinted and attached hereto as Appendix J at pp. 62a-67a, infra - which please see).

To allow the flagrant disregard for law and propriety found in the actions of the State D.A. in this case to remain unreviewed at the Federal level and thus be unchecked is unconscionable and will only encourage such disregard for the Constitutional rights of the accused by prosecutors in Dane County Wisconsin and elsewhere. Consideration Here is essential!

It is also clear that the intermediate State Appellate Court - the last Court to 'examine' (sic) the 'merits' of this

case - was acting neither in the best interest of justice nor in light of the established Constitutional safeguards for criminal defendants as established by This Court and ruling Federal case law applicable to State Court trials. While all this was much more fully developed by Petitioner in doc. 1a (of 12-31-86) below, it can be succinctly found in the facts that: a) the State Appellate Court ruled on the false testimony issue without listing any supportive law or case law for its action, and in clear contradiction of the standard set by Napue, Giglio, Iverson, Hamric, et al; b) It improperly applied findings from another State regarding bench trials to this lay jury trial on an issue that centered upon the effect of improper testimony upon the 'trier of the fact' in clear contradiction of the Federally recognized differentiation between bench and lay jury trials and

their interpretation of evidence; and c) It overruled the Trial Court's ruling of error (albeit 'harmless error') by finding 'no error' below via its ruling as a finding of fact that the 'lost evidence' was not 'lost' at all without conducting or ordering any hearing or investigation on the matter and went on to blame the lack of 'proof of loss' upon the defendant - when all parties in the action had theretofore admitted the evidence was lost by the State, and the Trial Judge had also clearly affirmed its loss as had the D.A. in the case. Moreover, the State Trial Court's finding of 'harmless error' could not stand up to Federal scrutiny. As the Trial Court, after accepting the State's statement of loss as fact, never made any formal inquiry of the actions of the State regarding the loss. Thus, despite the ruling Federal case law (e.g. - Augenblick, Bryant,

Loud Hawk, Pollock, et al) the State was able to avoid explaining how and why the loss occured. And, it was the testimony regarding this 'lost evidence' that the State improperly used to 'link' the defendant to the 'crime scene' which he testified he was never at before the lay jury, and with no other supportive evidence this 'lost evidence' became crucial to the State's case, as did its poisoning effect upon the lay jury's verdict, and hence there was a definite need, under Federal law, for the State to explain how and why the loss occured. But here the State avoided such explanation to the detriment of justice.

To allow the unpublished ruling of the intermediate State Court to stand as the last word here is unconscionable, stands Federal case law on its head, and encourages futher improper behavior by the Wisc. State Courts. Review is needed!

CONCLUSION

For these various reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the Judgment and Order of the U.S.C.A. for the 7th Circuit. The present case is illustrative of persistent and serious misapplication of the Barefoot ruling of This Court in connection with an important phase of judicial business of both that Court and This Court. The 7th Circuit Court has turned the appellate process into an obstacle course (if not a blocade insulating its District Courts' rulings from review by This Court) for an entire class of appellants: State habeas applicants. Indeed, so clear is the error of misinterpretation by the Court of Appeals that summary reversal of the Order would be appropriate. Because of the posture of this case, this is now the only opportunity for the petitioner to seek

review of the District Court ruling that 'custody for the purposes of habeas review' is non-existent; this matter should be remanded to the 7th Circuit by This Court's immediate grant of a Certificate of Probable Cause of part of a summary reversal. Alternatively, This Court could upon such a grant of a C-P-C further instruct the Circuit Court to consider the 'merits' of the habeas petition alleging error in the State process below when reviewing the the District Court's finding in this case.

Also, for the various reasons set forth above, it is further respectfully submitted that this petition for certiorari under the All Writs Statute be granted so as to directly review the judgment and Order of the U.S. District Court for the W.D. of Wisconsin which dismissed the habeas petition of Mr. O'Rear.

Respectfully submitted,

TERRY J. O'REAR
P.O. Box 7203
Madison, WI
53707-7203
(608) 255-8486

Petitioner, pro se

A P P E N D I X

APPENDIX A

(Decision Below - USCA 7 - 5-14-87)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 14, 1987.

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge

TERRY J. O'REAR, Petitioner-Appellant	Appeal from the United States District Court for the Western District of Wisconsin.
No. 87-1513 vs.	
ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent-Appellee.	No. 86 C 934 John C. Shabaz, Judge

O R D E R

Petitioner filed for a writ of habeas corpus, 28 U.S.C. § 2254. The district court dismissed the petition and declined to issue a certificate of probable cause.

Petitioner has now file an appli-

cation for a certificate of probable cause. This court has carefully reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a federal right; the petitioner has failed to demonstrate that he should prevail on the merits, that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot v. Estelle, 103 S. Ct. 3383, 3394 n.4 (1983). Accordingly, the request for a certificate or probable cause is

DENIED.

APPENDIX B

(Decision Below - USCA 7 - 8-12-87)
(Order on Rehearing)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 12, 1987.

Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge

TERRY J. O'REAR, Petitioner-Appellant,	Petition for a Certificate of Probable Cause from the United States District Court for the Western District of Wisconsin
No. 87-1513 v.	
ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent-Appellee.	No. 86-C-934 JOHN C. SHABAZ, Judge.

O R D E R

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition and declined to issue a certificate of probable

cause. Petitioner was subsequently denied a certificate of probable cause by this Court.

Petitioner has now filed a petition for a rehearing on the denial of a certificate of probable cause. This court again has carefully reviewed the final order of the district court and the record on appeal. We still find no substantial showing of the denial of a federal right; the petitioner has failed to demonstrate he should prevail on the merits, the issues raised are debatable among jurists, the court could resolve the issues differently, or the questions deserve further proceedings. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Accordingly,

IT IS ORDERED that the request for a rehearing is DENIED.

APPENDIX C

(Decision Below - W.D.Wisc. - 03-27-87)
(Order on Request for C-P-C)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR,
Petitioner,

v.

ATTORNEY GENERAL
OF THE STATE OF
WISCONSIN,
Respondent.

ORDER

86-C-934-S

Petitioner's petition for a writ of habeas corpus was dismissed on March 4, 1987. On March 26, petitioner submitted a notice of appeal and a request for certificate of probable cause, and paid the $70 filing fee.

Having reviewed again the petitioner's claims, the Court concludes that his claims are without merit. Therefore, the Court certifies that petitioner's appeal is not taken

in good faith, and will not grant a certificate of probable cause.

ORDER

IT IS ORDERED that petitioner's request for a certificate of probable cause is DENIED.

Entered this 27th day of March, 1987.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX D

(Decision Below - W.D.Wisc. - 03-04-87)
(Final Order Dismissing habeas Petition)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR, Petitioner,	)	
v.	)	ORDER 86-C-934-S
ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent.	)	

Petitioner filed a petition for a writ of habeas corpus on December 31, 1986 challenging his January 1981 conviction for second degree sexual assault and false imprisonment even though he is no longer in custody pursuant to this conviction. An order to show cause why this writ should not issue was entered on January 12, 1987. Respondent filed a motion to dismiss on February 3, 1987 and petitioner

filed a responsive pleading on February 24, 1987. Petitioner also filed a motion to disregard the respondent's motion to dismiss and a motion to reconsider this Court's decision that his second claim was not meritorious. Petitioner's motion to disregard the respondent's motion to dismiss must be denied. The Court finds that the respondent's motion was not filed in bad faith.

Petitioner has filed a motion to reconsider this Court's January 12, 1987 decision that his petition for a writ of habeas corpus was not "constructively" filed on August 14, 1985 when he requested the forms from the clerk's office. The Court finds that obtaining forms cannot be

considered to be initiating any type of court action. Many litigants request forms and never file cases. Furthermore, since petitioner had exhausted his state remedies in March 1983, he had two years to file his petition prior to August 1985. The Court again finds petitioner's claim to be without merit and will deny petitioner's motion for reconsideration.

FACTS

Petitioner Terry J. O'Rear was convicted of second degree sexual assault and false imprisonment on January 8, 1981 in Dane County Circuit Court. He was discharged early from his sentence of conviction on August 22, 1985. He filed this petition for a writ of habeas corpus on December 31, 1986.

CONCLUSIONS OF LAW

Petitioner contends that even though he has been released from his sentence he is still in constructive custody because of the general collateral consequences of his

conviction and because of restraints on his movements. He argues that he cannot obtain his Ph.D. degree in Comparative Politics because he cannot travel abroad to complete his research. Respondent argues that this Court does not have jurisdiction pursuant to 28 U.S.C. §2254 because petitioner is not "in custody" within the meaning of the statute.

The United States Supreme Court has held that "custody" as used in 28 U.S.C. §2254 is not limited to actual

physical restraint but may include other significant restraints on personal liberty such as conditions of parole, Jones v. Cunningham, 371 U.S. 236 (1963), or bail release on personal recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973). In a more recent case, Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), the Court held again that bail release on personal recognizance did constitute custody within the meaning of 28 U.S.C. §2254.

In Carafas v. LaVallee, 391 U.S. 234 (1968), the United States Supreme Court held that, where a petitioner had filed a petition for a writ of habeas corpus while incarcerated and was then released from his sentence, the release did not moot his petition because of the collateral consequences. The United States Supreme Court has not addressed

habeas corpus jurisdiction in a case where the petitioner has been unconditionally released from his sentence at the time the petition is filed.

-4-

In Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), cert. denied, 426 U.S. 911 (1976), the Eighth Circuit Court of Appeals found that a petitioner who had been unconditionally released from his sentence is not subject to severe and immediate restraints and is therefore not "in custody." In this case, Harvey contended he was unable to pursue certain professions or possess a firearm.

In Hanson v. Circuit Court of First Judicial Circuit, 591 F.2d 404 (7th Cir. 1979), cert. denied, 444 U.S. 907 (1979) held that the collateral consequences

flowing from a fine-only conviction were not severe enough to constitute custody within the meaning of 28 U.S.C. §2254. The Seventh Circuit Court of Appeals has not addressed habeas corpus jurisdiction in a case where a petitioner has been released from a prison sentence before filing a petition for a writ of habeas corpus.

Petitioner contends that in Carafas v. LaVallee, supra, the Court held that collateral consequences of a conviction establish custody. However, this Court does not agree and finds that the Court held that a release from sentence after a petition is filed does not moot the petition because of the collateral consequences. Petitioner O'Rear's case is distinguishable because he did not file the petition while he was incarcerated or on parole.

Petitioner argues that even though he was released from his sentence prior to filing his petitions the collateral consequences are so severe as to constitute custody. He attempts to distinguish his case from both Hansen and Harvey, supra. He states that his collateral consequences are more severe than consequences flowing from the fine-only conviction found not to be custody by the Seventh Circuit Court of Appeals in Hanson. This may be true, but collateral consequences of a conviction do not constitute custody after the petitioner has been released from sentence.

Conviction of a felony may deprive one of certain civil rights such as the right to vote, the right to hold public office, the right to serve on a jury,

the right to possess any kind of firearm and the loss of those other valuable rights of which the petitioner complains.

This Court finds the Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), cert. denied 426 U.S. 911 (1976) to be persuasive. In Harvey the Court found that a petitioner who was not able to pursue certain professions or possess a firearm after an unconditional release from a three-year prison sentence for grand larceny was not in custody for purposes of a petition for a writ of habeas corpus.

Although petitioner argues that his case can be distinguished from Harvey, the Court is not conviced. The Court

finds that the collateral consequences of petitioner's conviction do not

subject him to severe and immediate restraints. Petitioner is not in custody within the meaning of 28 U.S.C. §2254. The respondent's motion to dismiss must be granted because this Court does not have jurisdiction in this case.

ORDER

IT IS ORDERED that petitioner's motion to reconsider and motion to not consider respondent's motion to dismiss are DENIED.

IT IS ORDERED that respondent's motion to dismiss the petition is GRANTED.

IT IS FURTHER ORDERED that this petition for a writ of habeas corpus is DISMISSED.

Entered this 4th day of March, 1987.

BY THE COURT

_____
District Judge

APPENDIX E

(Decision Below - W.D.Wisc. - 01-12-87)
(Preliminary Order)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR,
Petitioner,

v.

ATTORNEY GENERAL
OF THE STATE OF
WISCONSIN,
Respondent.

ORDER

86-C-934-S

On December 31, 1986, petitioner filed this petition for a writ of habeas corpus and paid the filing fee. He is challenging his January 1981 conviction for second degree sexual assault and false imprisonment.

Petitioner alleges that he was discharged early from his sentence of conviction on August 22, 1985. Therefore, he is no longer in the custody of the State of Wisconsin pursuant to this

conviction.

Petitioner argues that he is still in constructive custody because of the collateral consequences of the conviction. Although the Court is not convinced this argument is meritorious, the Court will allow the respondent to respond before reaching its decision.

Petitioner's argument that this petition should issue because he took steps to file the petition while he was on parole but did not do so is without merit.

It is possible that petitioner could prove he is still in custody pursuant to 28 U.S.C. §2254, and that this custody is unconstitutional.

Accordingly,

ORDER

IT IS ORDERED that the respondent shall file and serve upon petitioner

a response to this petition not later than twenty (20) days from the date of service of this petition, showing cause, if any, why this writ should not issue. Affidavits may accompany the response. Petitioner may have twenty (20) days from the service of the response to file and serve upon counsel for respondent a traverse to the allegations of the response submitted by the respondent. Affidavits may accompany the traverse. Such affidavits shall raise no issues which have not already been raised in the petition and response. Affidavits shall be made on personal knowlege, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Copies of all papers or parts thereof referred to in an

affidavit shall be attached thereto or served and filed therewith.

Entered this 12th day of January, 1987.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

(Here are set forth, successively, excerpts from: Article I, Section 9 of the Constitution, the Fifth Amendment, and the Fourteenth Amendment, Section 1.)

Article I of the United States Constitution

Section 9

(unnumbered par. 2) The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Amendments to the United States Constitution

Fifth Amendment.

> No person shall...be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment. Section 1.

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

(Here are set forth, successively, Sections 1254(1), 1651, 2241(c)(3), 2253 and 2254 of Title 28 of the United States Code.)

28 U.S.C. Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. Section 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. Section 2241(c)(3)

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. Section 2253

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. Section 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Federal Regulations

(Here are set forth, successively, Rule 22(b) of the Federal Rules of Appellate Procedure and Rule 1 of the Rules Governing Section 2254 cases in the United States District Courts.)

Federal Rules of Appellate Procedure (1967; 1986)

Rule 22. Habeas Corpus Proceedings

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the

writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Rules Governing Section 2254 Cases in the United States District Courts (1976; 1986)

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. §2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

APPENDIX G

STATEMENTS ON THE FACTS
OF THIS CASE
PREVIOUSLY PRESENTED TO
THE DISTRICT COURT

(Here are set forth portions of the "Statement of the Case" presented to the W.D. of Wisc. Federal District Court on 12-31-86 as part of petitioner's "habeas brief" - doc. no. 1a below.)

Facts Regarding the Origin of the Case
(as previously presented on 12-31-86 at pp. 5-11 of doc. no. 1a below)

p.5 (last par.)

The events out of which this case arose took place in Madison, Wisconsin on the first and second of January, 1980. The complaining witness, Nina Tuman, had come to Madison from her home in Chicago, Illinois to celebrate the New Year's holiday with Ms. Sandy Reynolds and Ms. Ruth Schultz, friends from her college days. At this time, Ms. Tuman was twenty-six years of age. On January 1,

1980, Ms. Tuman and several of her friends went to the Headliners bar and nightclub in Madison. While she was there, she admitted to drinking two or three beers. The defendant, Terry J. O'Rear, was also at the Headliners bar on January 1, 1980 in the company of his roommate, Mr. Tito Castillo. After the main "dance hall" portion of the night-club closed, at approximately 12:30 a.m. on the morning of January 2, 1980, Mr. O'Rear and his roommate were engaged in playing a video electronic game in the foyer to the "dance hall." Ms. Tuman came up to watch, conversation ensued which culminated with Mr. O'Rear and Mr. Castillo being invited by Ms. Tuman to a party. The party was to be at the house of a friend of Ms. Tuman.

Ms. Tuman decided to ride with Mr. O'Rear and Mr. Castillo in Mr. Castillo's car on the way to the party. While waiting in a parking lot for Ms. Tuman's friend's pick-up truck which would subsequently be followed, Mr. Castillo decided against going to the party. Therefore, Mr. O'Rear and Ms. Tuman took Mr. Castillo to the home he shared with Mr. O'Rear. Mr. O'Rear then took over driving and they then continued on to the party following the pick-up truck, containing Ms. Reynolds and Messrs. Murray and Phippen.

While they were in the car, Mr. O'Rear and Ms. Tuman shared a marijuana cigarette. According to Mr. O'Rear and Mr. Castillo, Ms. Tuman also used an inhalent drug, which she referred to as 'Rush,' contained in a small, brown bottle. At the trial Ms. Tuman denied

using this 'Rush' substance, but she did admit to posessing it. ('Rush' is common 'street language' for the drug 'butyl nitrite' which at the time in question (unlike at the time this petition is being filed) was not an illegal substance but was "readily available in adult bookshops" in the area, and its "most frequent use is to prolong the subjective sensation of orgasm, or to give a 'disinhibited, giddy, sexy' feeling." (Quotations from the report of Dr. Carl Getto, M.D., formally presented at the

Post-Conviction Hearing in this case and found at document numbered below as R61 at Exhibit G, last page).

The party, which was located at Brad Johnson's residence on Fish Hatchery Road, lasted until either

approximately 3:00 a.m. (according to Mr. O'Rear) or 4:00 a.m. (according to Ms. Tuman). The following persons were present at the 'party': Mr. O'Rear, Ms. Tuman, Ms. Reynolds, Ms. Schultz, and Messrs. Johnson, Murray, and Phippen. All except Mr. O'Rear had known Ms. Tuman for some time, and were therefore her set of friends or acquaintances. All of the participants drank beer, but it is disputed whether any used drugs. Mr. O'Rear testified that all persons present at the party, including himself, used marijuana, smoking it in a "bong" pipe, and that Ms. Tuman and her friends additionally used 'Rush,' contained in a brown inhalent bottle. At trial, while Ms. Tuman and her friends Ms. Schultz and Ms. Reynolds denied any drug usage by anyone (including Mr. O'Rear) at the party and Mr. Murray

said he could not directly recall drug usage only that "it could have" happened (R72, p.28-29), they all did admit that drug paraphernalia such as a "bong" pipe used for the smoking of marijuana and an inhalent bottle containing a substance that produced a "rushing sensation" similar to 'amyl nitrite' (R71, p.54) were openly present at the 'party' (despite the fact that they claimed to have no personal knowledge of the term 'Rush.'). It was also admitted at the trial that at the end of the party, Ms. Tuman threw the bottle of 'Rush' at Ms. Schultz, hitting her in the lip. Following this bottle throwing incident the 'party' came to its conclusion.

While Ms. Tuman was staying at Ms. Reynold's apartment at a different location in Madison, (the same Ms.

Reynolds who was also present at the party having arrived in the pick-up), rather than returning there with Ms. Reynolds and her two male friends (who also were staying at Ms. Reynold's apartment) in

their pick-up truck, Ms. Tuman again chose to ride in the car driven by Mr. O'Rear (who agreed to follow the pick-up to this other location as he did not know the location or address of Ms. Reynold's apartment). This trip required that the cars proceed north on Fish Hatchery Road turning West on the Beltline Highway and then proceeding on the Beltline until the Gammon Road exit. As a result of the combination of wet and icy road conditions that night, a lack of familiarity with Mr. Castillo's car, and his admitted ingestion of

alcohol and marijuana, Mr. O'Rear, who did not know in advance which exit he was to take, accidently went into a skid at the Gammon Road exit and was unable to follow the other vehicle down the exit ramp. After pulling out of the skid, having passed the exit ramp, and desiring to avoid an accident by backing up on the highway, Mr. O'Rear continued driving on the Beltline Highway, leaving it at the next available exit at Mineral Point Road so as to thereby reconnect with Gammon Road.

Until this point in time, with the exception of the disagreement over the drug usage and the time of the end of the party, there is no significant dispute as to the facts. However, from here on, there is a complete dichotomy in the stories of the two principal actors.

Mr. O'Rear testified that he turned east on Mineral Point Road and, after briefly stopping to get some fresh air and exercise so as to clear his head and then exchanging telephone numbers, he took Ms. Tuman to her friend's apartment, which she directed him to, on Flower Lane. He then went home, arriving before 4:00 a.m., shared some cigarettes and conversation with Mr. Castillo, and went to bed at approximately 5:15 a.m. (R72, p.81) - which was confirmed by Mr. Castillo (R72, p.47 and 49).

Ms. Tuman, on the other hand, while affirming that she had given Mr. O'Rear her Chicago home telephone number, claimed she was raped. According to

Ms. Tuman, Mr. O'Rear, upon leaving the beltline, proceeded west on Mineral

Point Road until he pulled into the parking lot of the Speedway Bar in the Town of Middleton. It was here that Ms. Tuman claims she was raped from approximately 4:20 a.m. to 5:45 a.m. According to Ms. Tuman, she was sexually assaulted in the front seat of the car parked in the bar parking lot. The car was described as having bucket seats with a stick shift and console in the center. Ms. Tuman testified that, with the exception of a statement to the effect that if she did not cooperate, she could get hurt, Mr. O'Rear did not physically threaten or hurt her. However, according to Ms. Tuman, this statement was sufficient to cause her not to resist the assault. According to Ms. Tuman the assault of 1½ hours included vaginal penetration and attempted anal penetration. Ms. Tuman

also stated that the defendant did not ejaculate inside of her and that he supposedly attempted to wipe Ms. Tuman clean by using a white glove. (Note: No glove was ever found in this case). Then, according to Ms. Tuman, after the alleged prolonged rape, Mr. O'Rear took her to her friend's apartment. Upon reaching her friend's apartment at approximately 5:50 a.m., Ms. Tuman testified that while she awoke one of the women (a Roxanne, last name never disclosed) staying there so as to be let in, she said nothing to her as to any sexual assault. Nor did she awaken, inform, or solicit the aid and comfort of any of the following additional individuals whom she stated were asleep within the same apartment when Roxanne let her in: her close friend Ms. Reynolds; Mr. Murray; Mr. Phippen;

and Ms. Reynold's daughter. Instead, she showered and after approximately another hour (i.e. at about 7:00 a.m.), she "went in and slept with Sandy" (i.e. - Ms. Reynolds). (R71, p.29). She said she awoke at about 9:30 a.m. the next day and then discussed the "sexual assault" with her friend for several hours over coffee. At the end of

this discussion, they decided to call the police, which they did at approximately 2:00 p.m. that afternoon.

Upon receipt of the complaint, an investigation was conducted, evidence collected and an arrest made. Both Mr. O'Rear and Ms. Tuman gave specimens for scientific testing and evaluation. Evidence collected, included the clothes Ms. Tuman allegedly wore on the

night in question and a cigarette butt allegedly from a handrolled cigarette, which was said to have been found some 20-25 hours after the alleged incident in the parking lot of the Speedway Bar, and was given into the safe keeping of the Dane County authorities.

During the course of pretrial proceedings in this lawsuit, two formal documents were filed by George Strother, Mr. O'Rear's previous trial attorney, which requested the discovery of certain evidence and disclosure of exculpatory evidence or information. The documents, which were filed on February 29, 1980, and were entitled Notice of Motion and Motion for Discovery, and Demand for Discovery and Inspection. (Numbered below as R13 and R14).

In addition to the formal requests

for exculpatory evidence listed above, questioning at the preliminary hearing on January 28, 1980 was intended to discover exculpatory evidence. During the hearing, defendant's Trial Counsel, Attorney George B. Strother, questioned Ms. Tuman about the use of drugs on the night in question. Ms. Tuman, as she did throughout these proceedings, denied the use of drugs other than the one marijuana cigarette in Mr. Castillo's car. However, during a sequence of questions involving the argument that occurred between Ms. Tuman and Ms. Schultz at the end of the party which should have led to the admission of the fact that Ms. Tuman had a bottle of 'Rush' in her possession, the Judge noticed Ms. Tuman was clearly receiving hand signals from the one person who was allowed to

remain in the courtroom as her support witness--Ruth Schultz (the same Ruth Schultz who's argument/tiff/fight with

Ms. Tuman caused the party at Brad Johnson's house to break up). (R70, p.35). Judge Frankel described one of those hand signals as a finger being drawn across the throat. (R70, p.36). After the hand signals were delved into (R70, pp.36-48), further questioning did not disclose anything concerning the 'Rush'[1]. Additionally during the Preliminary Hearing the prosecution's objections prevented the answering of questions intended to

[1] Only later at the trial, was it admitted that Ms. Tuman had the bottle of 'Rush' in her possession and that at the end of the party Ms. Tuman threw this bottle at Ms. Schultz, hitting her in the lip. (R71, pp. 101-02 and 115-17).

elicit the fact that Ms. Tuman had engaged in consentual sexual intercourse the evening prior to the alleged assault - which could be a source of any seminal materials if such were to be found in Ms. Tuman's samples and which would be allowable as evidence as per Wisconsin State Statute Sec. 972.11(2)(b)2. (R70, pp. 51-54).

Facts Regarding Mr. O'Rear and this Habeas Action (covering the period from his release from prison to his submission of his habeas petition, as previously presented on 12-31-86 at pp.2-5 of doc. no. 1a below)

p.2 (line 6)

After 24 months in the state prison system, Mr. O'Rear was granted an earned early parole by the Wisconsin State Parole Board due to his good behavior and was turned over to the State parole authorities in Madison on May 26, 1983. Following his release

from prison, Mr. O'Rear was constantly employed, at times having three separate employers and working over 70 hours a week. Throughout this period he economically maintained himself, repaid his substantial past educational and legal financial obligations, and, whenever he found time, conducted his own research into the law as related to his case so as to develop an effective habeas presentation. Being employed he could not claim poverty so as to request free legal representation, but at the same time, given his past debts and low wages, he also could not afford to hire a private attorney at their current rates; thus, Mr. O'Rear turned to the only remaining alternative--that of studying the law and researching the issues personally so as to represent himself. Admittedly

this process was tortuous, arduous, time consuming and slow-paced. Finally, by early August, 1985 the final draft of the proposed brief was completed.

Following the drafting of the brief then to be presented to this Court (found below in Facts sub.2, and in the expanded upon Heading III - Petition in Re: O'Rear v. Wisconsin), on August 14, 1985 Mr. O'Rear, acting as his own attorney, obtained the necessary formal papers in order to file a habeas action

from the offices of this Court in downtown Madison. As soon as scheduling would allow thereafter, at 3:00 p.m. on August 20, 1985, Mr. O'Rear met with the pro se law clerk for the Western Federal District Court for Wisconsin (Ms. Hollar) for approximately 45 minutes in order to discuss the proper

methods of filing the recently obtained aforementioned materials and the ways to interface them with the brief already drafted. Two days later, while in the process of finalizing and formalizing his habeas petition, but prior to actually filing it with this Court, Mr. O'Rear went to his regular tri-monthly meeting with his Wisconsin State parole officer (Ms. Jaeger) at 3:30 p.m., August 22, 1985. Shortly after his arrival Mr. O'Rear was surprisingly handed a document granting him an unscheduled early discharge from the sentence of conviction which was to have continued until January 8th, 1987. (See Exhibit A attached to today's Brief). Mr. O'Rear was informed that the discharge was due to his above-average and excellent behavior while on parole.

Upon examination of said document, Mr. O'Rear discovered that it had been dated on August 7, 1985 and signed by the Director of Wisconsin's Division of Corrections on August 9, 1985. (See today's Exhibit B attached hereto). Mr. O'Rear had not petitioned or requested such a discharge from the State of Wisconsin. He also was unaware that he would be handed this document at his regularly scheduled meeting with his parole officer on August 22. And, in this manner he only became aware that he was discharged by the State of Wisconsin some 15 days <u>after</u> the discharge document was drafted and 13 days <u>after</u> it was signed. Also upon receiving this document Mr. O'Rear realized it would be impossible to formally file his habeas materials prior to the receipt of the back-dated

discharge document. He further realized that at best the date that he met with the pro se law clerk and/or the date that he obtained the necessary materials to file his petition would have to be viewed by this Court as EQUIVALENT to formal filing some 2-8

days prior to the actual receipt of the discharge document, with the Court also viewing the receipt of the discharge document as the date of Mr. O'Rear's actual discharge rather than either of the two dates found on the face of said document. While praying that the Court would view the situation equivalently, Mr. O'Rear likewise realized to blindly assume that the Court actually would do so would be another matter. And, given the formal world of judicial logic and decision-making, he felt it an absolute

necessity to present formal written arguments to this Court stating why the Court should not dismiss Mr. O'Rear's habeas petition outright. Therefore, in a sincere and desperate attempt to prevent a final kafkaesque 'fait accompli' from dashing habeas relief and justice, Mr. O'Rear set out to research the matter and develop an argument which would best present his case to this Court.

Said research had admittedly been time consuming and extensively complicated, particularly for the non-lawyer Mr. O'Rear who has had to continue to earn his subsistence at the same time. The argument presented under section II below is the result of said research. In the process of such research on section II, Mr. O'Rear also ran across certain materials which he has incorporated into the Brief that was in its

final draft state in early August 1985 thereby producing today's section III. The sole reason for the delay since August 22, 1985 was the study and research necessary to best present this material to this Court. Had Mr. O'Rear not been unexpectedly given the early discharge document on August 22, 1985 these additional arguments and their related research would not have been necessary, and the earlier non-expanded petition, which was already in its final form, would have been presented to this Court in early September 1985, prior to any subsequent discharge and to the scheduled termination date of January 8, 1987. Conversely, given that Mr. O'Rear was completely unaware of the actions being taken by the

Division of Corrections in August, 1985 regarding himself, and given that the action that occurred on August 22 was completely unforseen, Mr. O'Rear felt no special need to rush the filing of his habeas petition prior to August 22, 1985. For had he known of what was to happen on August 7, 9, and 22, 1985 in advance of their occurance, the completion of his habeas would have been speeded and actually filed prior to these events, which would have made the arguments on the issue of standing needless and, at the same time, made the additional delay since August 22, 1985 unnecessary.

APPENDIX H

Direct Quotation from the 1983 ruling of This Court in Barefoot v. Estelle

---

We agree with the weight of opinion in the Court of Appeals that a certificate of probable cause requires a petitioner to make a "substantial showing of the denial of (a) federal right." [citations omitted][4]

* * *

4. The following quotation cogently sums up this standard:

> "In requiring a 'question of some substance,' or a 'substantial showing of the denial of (a) federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are 'adequate to deserve encouragement to proceed further.'" Gordon v. Willis, 516 F.Supp. 911, 913 (ND Ga.1980) (citing United States ex rel. Jones v. Richmond, 245 F.2d 234 (CA2), cert. denied, 355 U.S. 846, 78 S.Ct. 71, 2 L.Ed.2d 56 (1957).

Barefoot v. Estelle, 463 U.S. 880 at 893 and 893, n.4, 103 S.Ct. 3383 at 3384, n.4, 77 L.Ed.2d 1090 (1983).

- first emphasis added by Petitioner; 2nd emphasis & all portions inside of parentheses in Supreme Court original.

APPENDIX I

Reprints of the Whether-type Questions Regarding Petitioner's three (3) Arguments concerning Jurisdiction/Standing as refined in his Application for a Certificate of Probable Cause (doc. no.19 below) and presented on 03-26-87 to the Federal District Court for the W.D. of Wisc. (at p.4, 6-7, 10-11, 12, 15, 17 & 18 thereof)

Questions Concerning Argument A of today's Petition for Certiorari (lettered c) on 03-26-87).

Whether Standing for Habeas Jurisdiction was established via actions taken by Your Petitioner while on parole prior to his being handed his 'discharge document' by his parole officer?
(Brief of Dec. 31st, 1986 at pp.25-26).

(i) Whether the application for a Writ of Habeas Corpus is a process that includes various actions taken prior to a Petition being date-stamped?

(ii) Whether it was clear to officers of this Court that Your Petitioner was in the process of filing his Petition prior to his being unexpectedly discharged; and whether this counted for anything or in any way could be considered as the same as a date-stamp?

(iii) Whether the intervention of the State of Wisconsin in the unexpected and unannounced act of independently issuing an early discharge of Your Petitioner constituted an objective external

factor that impeded Your Petitioner from complying with the procedural rule that the application process be completed while in paroled custody and whether such intervention and impediment constitutes sufficient just cause to excuse the alleged procedural default of not formally 'filing' his Petition by securing a 'date stamp' on the face of his Petition while under paroled custody (as said informal procedural rule is in effect in this District given its Order of March 4th and said default is what is currently preventing this Court from reviewing "the merits" of the instant habeas Petition)?

Questions Concerning Argument B of Today's Petition for Certiorari (lettered a) on 03-26-87).

Whether Standing for Habeas Jurisdiction was established for Your Petitioner via 'restrictions on movement' wherein Your Petitioner is "being restrained from movement out of the United States so as to pursue his chosen and trained profession - restrained by actions based upon American law"?
(Brief of Dec. 31st, 1986 at pp.27-33).

(i) Whether American citizens are entitled to habeas review on the same basis that foreign aliens are on the matter of restrictions on international movement?

(ii) Since Federal Courts have found the result of being "continually barred from" this country "to be a significant restraint upon" an alien's

individual liberty and of "sufficient collateral consequence" to find such an alien "'in custody' for the purposes of habeas corpus review", Whether the same applies to an American citizen who, like Your Petitioner, is being "continually barred from" other country(ies) because of his American criminal conviction which is alleged to be unconstitutional?

(iii) Whether 'custody for the purposes of habeas review' in regard to crossing international borders exists only for aliens and not for American citizens? (i.e.-Whether justice at the border is only a one-way street with aliens having more rights on its thoroughfare than citizens?).

(iv) Whether Your Petitioner's <u>right</u> to international travel and movement (as established by numerous international treaties and diplomatic accords to which the United States of America is a signatory and/or guarantor, which through the Constitution are thus also constitutionally guaranteed rights) is being restrained by his alleged unconstitutional conviction, and whether this special denial of his 'individual liberty' to 'move where he chooses' and to 'go where he will' on its own constitutes the requisite 'custody' for habeas review?

(v) Whether the result of Mr. O'Rear's being barred from entry and residence for purposes of educational and scientific study and research

in Western Europe because of his Wisconsin conviction constitutes a significant restraint upon Your Petitioner's individual liberty and is of "sufficient collateral consequence" so as to establish a finding of 'in custody' for the purposes of habeas corpus review of the cause of that bar and that restraint - that is of the condition that bars and restrains him - namely, of the Wisconsin conviction which is the issue of the instant Petition?

Questions Concerning Argument C of Today's Petition for Certiorari (lettered b) on 03-26-87).

Whether Standing for Habeas Jurisdiction was established via actions taken by Your Petitioner while on parole prior to his being handed his 'discharge document' by his parole officer?
(Brief of Dec. 31st, 1986 at pp.25-26).

(i) Whether the holding in Hanson that the ordinary collateral consequences flowing from a fine-only conviction do not place such a convicted person in custody for the purposes of habeas review applies to all types of convictions, or whether it was meant to be limited to fine-only convictions?

(ii) Whether the 7th Circuit Court in Section II of its Opinion in Hanson based its determination upon the nature of the original conviction itself or upon the nature of the later existing collateral consequences themselves?

(iii) Whether the distinction made in Hanson (when discussing and deliberating upon 'custodial' situations continuing to flow from earlier completed convictions) between the deprivation of property (or fine-only convictions) on the one hand, and the deprivation of actual liberty (or prison/jail-time convictions) on the other hand still carries weight; and, if so, how it impacts upon the instant case?

(iv) Whether a situation such as that of Your Petitioner's (where the current existing collateral consequences and/or civil and legal disabilities, which continue to remain despite the expiration of a sentence and which directly flow from a conviction that did originally involve an actual loss of liberty via physical imprisonment) is distinctive enough from the 'fine-only' conviction found in Hanson to meet the 'in custody' requirement for habeas corpus review of an alleged unconstitutional conviction?

(v) Whether Your Petitioner's situation is one of those "recognized situation[s] in which habeas corpus may lie even though the petitioner is not imprisoned due to the challenged conviction" which the Seventh Circuit Court of Appeals has mentioned as capable of existing "where the conviction has collateral consequences"?

(quoted sections from Harts v. Indiana, 732 F.2d 95 at 96, n. 1 (7th Cir.1984) and cited in full context at page 47 of Your Petitioner's Traverse Brief of Feb. 24, 1987).

(vi) Whether the one page opinion made by the Eighth Circuit Court of Appeals in Harvey v. South Dakota, supra, is approved of for general use in the Seventh Circuit; and, if not, whether the Seventh Circuit Court of Appeals feels that in this Circuit a different method of analysis (e.g. - such as that expressed in Hanson, supra) is preferred; or, if Harvey is approved, whether distinguishing features found to exist between the Harvey case and any case under review should be seriously and directly addressed before the Harvey finding is applied to the other case?

(vii) Whether Chief Justice Rehnquist's statement made in his Opinion in Strait v. Laird, supra, (1972), that the habeas 'in custody' requirement in Carafas, supra, (1968), was held (of found) "because" of "the disabilities of his conviction" (that is, because of the 'collateral consequences' of his conviction) was in error? And, if this statement made by the current Chief Justice of the United States is not in error, whether this Court's Order of March 4th, 1987 in the instant case can stand, in that it contradicts Justice Rehnquist's clarification of Carafas?

(viii) Whether the Opinion found in Glover v. North Carolina, supra, which held that "general 'collateral consequences'" are "sufficient" to give a petitioner "standing to challenge his conviction in federal habeas corpus

regardless of whether the filing of his petition occured before or after the termination date of the challenged sentences" is approved of for general use in the Seventh Circuit?; and, if so, whether this Court's Order of March 4th, 1987 in the instant case can stand, in that it is in direct opposition with Glover?

(ix) Whether the Seventh Circuit Court of Appeals approves Glover (supra) or Harvey (supra) for general use in this Circuit; or whether it feels that in this Circuit a different method of analysis is approved for use in situations similar to that of Your Petitioner on the related matters of standing for habeas review and "general 'collateral consequences'"?

APPENDIX J

ALLEGATIONS OF CONSTITUTIONAL ERROR

List of the allegations of error in the State conviction below as presented initially to the State of Wisconsin court system following conviction and as discussed in Petitioner's habeas documents presented to the District Court for the W.D. of Wisc. on 12-31-86 (doc. no. 1 and 1a).

Despite requests for discovery and exculpatory material made by Mr. O'Rear's trial defense attorney, the prosecution failed to disclose the following factual information:

a) That the complainant had engaged in consentual sexual intercourse with an individual other than the defendant within 72 hours prior to the alleged rape - which is allowable evidence as per Wis. S.Stat. Sec. 972.11(2)(b)(2).

b) The name of the individual described in sub a) above.

c) The fact that the complainant actually had in her possession a bottle of 'Rush' (or butyl nitrite) on the night in question, the exact contents of said bottle, the actual characteristics of its contents, and the place of its purchase.

d) That the hair samples obtained from the defendant were deemed to be "unsuitable" for scientific analysis and comparison.

e) A report detailing the results of the scientific tests conducted by the Wisc. State Crime Lab on the remainder of the specimens (including blood and saliva) provided by the defendant.

f) That the cigarette butt allegedly found at the scene of the alleged rape had been lost and would not be produced at trial.

At trial the following events occured which, in addition to the prosecution's failure to constitutionally disclose the existence of the above noted exculpatory material, the defendant upon his State appeal alleged as constitutional error:

1) The State crime lab expert witness gave false and materially misleading testimony, known by the prosecutor to be so, concerning the finding of evidence of suspect stains which collaborated the complainant's testimony as to where such stains could be, when the scientific report stated no such evidence was found in fact.

2) The State policewoman witness was allowed to testify as to finding a cigarette butt before the lay jury as being a 'handrolled' one when no one

other than that policewoman had seen or examined said butt and the butt itself was never introduced into evidence having been lost by the police without explanation (it was established at the trial subsequent to the policewoman's testimony that Mr. O'Rear on ocassion handrolled cigarettes).

Additionally the following became known to the defendant only after his conviction and confinement which the defendant upon appeal also alleged as error and as fundamentally unfair:

(i) A medical exam report of the complainant which noted her emotional state some 12 hours after the alleged rape showed "no apparent distress; not agitated" (thereby contradicting the trial testimony of the policeman who took her to said medical exam), and which also noted that there was no physical sign of any physical disturbance to either the complainant's outer genitalia or inner reproductive organs - instead they were noted by the Doctor as being in a 'normal' state, and which further noted that the 'wet mount' test for semen was Negative - all of which would tend to contradict the complainant's trial testimony of a long and repeated and painful rape.

(Presented as a document at the Post-Conviction Hearing some 11 months after trial on 11-16-81 by the defense - there numbered doc. no. R61, Exh. C and also contained as Appendix III-D in doc.

no. 1a presented to the District Court on 12-31-86 by petitioner).

(ii) The clothes turned over by the complainant to the police on 01-02-81 described in the police report of that date (R61, Exh. A) were described quite differently in the document of the State Crime Lab of 05-07-81 reporting 'tests' on such clothing (R61, Exh. B, p. 1) - in that three of the four items of clothing were described differently in terms of color and the fourth item disappeared altogether.

Refinement of the above allegations of error into whether-type questions which formed the basis of Petitioner's habeas petition of 12-31-86 presented to the W.D. of Wisc., with notation to the most relevant federal case law and the pages where discussed in the habeas document below.

I) Whether the admission of testimony concerning certain physical evidence which had been lost by the State violated Your Petitioner's right to due process? (in light of U.S. v. Augenblick, 393 U.S. 348 (1969), U.S. v. Bryant, 439 F.2d 642 (D.C. 1971), U.S. v. Loud Hawk, 627 F.2d 1139 (9th Cir. 1979); and U.S. v. Pollock, 417 F. Supp. 1332 (D.C. MA 1976).).

- Here see pp. 41-84 of doc. no. 1a below.

(II) Whether the false and misleading testimony of the State's Crime Lab Expert Witness which improperly corroborated a vital portion of the complainant's testimony prejudiced your Petitioner's defense and violated his right to due process? (in light of Napue v. Illinois, 360 U.S. 254 (1959), Giglio v. U.S., 405 U.S. 150 (1972), U.S. v. Iverson, 637 F.2d 799 (D.C.1971), and Hamric v. Bailey, 386 F.2d 394 (4th Cir.1967).).

- Here see pp. 85-101 of doc. no. 1a below.

(III) Whether the fact that the State failed to disclose certain evidence favorable to the defendant as required denied Your Petitioner of the right to a fair trial and violated his right to due process? (including the nondisclosed evidence relating to: the statutorially allowable information regarding the consensual sexual behavior of the complainant, the nature of certain drugs possessed and used by the complainant, the actual results of certain Crime Lab tests and analyses, and the fact that evidence had been lost by the State). (in light of Brady v. Maryland, 373 U.S. 83 (1963), U.S. v. Agurs, 427 U.S. 97 (1976), and U.S. v. Bagley, 473 U.S. ____, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).).

- Here see pp. 102-62 of doc. no. 1a below.

(IV) Whether in the context of the entire record of the case the disputed, suppressed and omitted evidence combine and point to the fact that the Constitutional right to a fair trial was denied to Your Petitioner? (in light of U.S. ex rel. Meers v. Wilkins, 326 F.2d 135 (2nd Cir.1964); Walker v. Engle, 703 F.2d 959 (6th Cir.1983); U.S. v. Bottone, 365 F.2d 389 (2nd Cir. 1966), and U.S. ex rel. Montgomery v. Ragen, 86 F.Supp. 382 (N.D. Ill. E.D. 1949).).

- Here see pp. 163-87 of doc. no. 1a below.